89-565

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was the Second Circuit correct in ruling that once a labor dispute has been classified as being a "minor dispute" under the Railway Labor Act, and thus subject to the exclusive jurisdiction of adjustment boards under Section 3 of that Act, rail labor may never utilize the Act's major dispute resolution process to resolve that labor dispute, even after an adjustment board rules that the carrier's claimed contractual justification was without merit?

2. If this Court does not summarily reverse the Second Circuit's decision in this case, but instead sets this case for briefing and argument, rail labor submits that the following issue should also be considered along with the primary issue:

> When the district court finds that a carrier has an obligation to bargain with rail labor over notices served under Section 6 of the Railway Labor Act demanding the negotiation of agreements to deal with the impact of a sale of rail lines on employees (thereby triggering the Act's status quo obligation), does a claim by the carrier that it has the contractual right to affect employees during the Act's bargaining process by abolishing their jobs, raise a dispute over the interpretation of the Railway Labor Act's status quo obligation within the exclusive jurisdiction of federal courts, or a dispute committed by Section 3 of the Railway Labor Act to the exclusive jurisdiction of adjustment boards?

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Petitioners United Transportation Union [hereinafter, "UTU"], eleven (11) other labor organizations, and twenty-six (26) union officials[1] [hereinafter collectively, "rail labor"] respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of that Court which was entered on June 7, 1989, in *CSX Transportation, Inc. v. UTU, et al.*, 879 F.2d 990, and summarily reverse that judgment as being inconsistent with this Court's recent decision in *Consolidated Rail Corp. v. Railway Labor Executives' Assoc.*, 491 U.S. —— (1989).

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[1] Petitioners are listed on Appendix I which is attached to this petition and reproduced in the separately bound Appendix; R.W. Earley, who was an appellant below, is no longer participating in this case due to an agreement which Mr. Earley's Committee reached with respondent.

OPINIONS BELOW

The decision of the Second Circuit is reported at 879 F.2d 990 and is reproduced in the separately bound appendix [hereinafter, "App."] at 1a-31a. The decision of the United States District Court for the Western District of New York, which was affirmed by the Second Circuit, is reproduced in the Appendix at 32a-62a and is reported at 688 F. Supp. 98.[2]

JURISDICTION

The judgment of the Court of Appeals (App. at 71a) was entered on June 7, 1989, and on June 22, 1989, petitioners filed an untimely petition for rehearing which was denied by the appellate court on August 29, 1989. App. at 73a. On August 30, 1989, and then on October 2, 1989 Justice Thurgood Marshall granted petitioners extensions of time in which to file this petition to and including October 6, 1989. Sup. Ct. No. A-169, *UTU, et al. v. CSX Transportation, Inc.* This petition is timely under 28 U.S.C. § 2101(c) and seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

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[2] On November 3, 1987, the district court dismissed a complaint by two union officers, including Mr. Earley (*see*, note 1, *supra*) in *Decker v. CSX Transportation, Inc.*, W.D.N.Y. Civil Action No. 87-1147C, which was subsequently consolidated with the suit by respondent against all of its unions and their counterclaim against respondent. *Decker* was initially dismissed because the court concluded that the unions' efforts to enforce the Railway Labor Act constituted an impermissible collateral attack on an order of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] exempting the rail line sale from regulation under 49 U.S.C. § 10901. The decision accompanying that order is reported at 672 F. Supp. 674. Mr. Decker and Mr. Earley asked the district court to reconsider its ruling and on May 26, 1988, the court vacated its prior order, concluding that the labor statute could be enforced without interfering with the Commission's permissive order. App. at 51a-53a. Since respondent did not challenge that ruling (*see*, App. at 8a n.3), the vacated ruling has not been reproduced in this already voluminous appendix.

STATUTES INVOLVED

This case involves rail labor's suit to enforce the bargaining and status quo obligations of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and respondent CSX Transportation, Inc.'s [hereinafter, "CSXT"] defense that the underlying controversy was a "minor dispute" under that labor statute over which the district court had no jurisdiction and over which rail labor could not strike. Sections 2 First, 3 First(i), (m), (p) and (q), 3 Second, 5 First, 6 and 7 First of the Railway Labor Act (45 U.S.C. §§ 152 First, 153 First(i), (m), (p) and (q), 153 Second, 155 First, 156 and 157 First) are relevant and have been reproduced in the Appendix at 99a-106a.

STATEMENT OF THE CASE

For the past several years, rail labor has been embroiled in what seems to be an endless dispute with our nation's railroads over whether rail labor can rely upon Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to require the railroads to bargain over the impact of rail line sales on employees *before* the carriers sell their rail lines and adversely affect their employees' seniority and other contractual rights. This case arose out of that dispute and began in 1987 when several rail unions on respondent CSXT, a carrier which operates a rail system of over 20,000 miles in the Eastern half of this Country, asked that carrier to bargain over the impact which a proposed sale of a 369 mile rail line by CSXT between Buffalo, New York and Eidenau, Pennsylvania, would have on the employees' seniority and other contractual rights. Before this case was decided by the district court, all of the petitioning labor organizations had filed comparable notices on CSXT under Section 6 of the Railway Labor Act to bargain for agreements to apply to the sale.[3]

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[3] Many of those notices were served prior to April 1, 1988, but after respondent CSXT raised as one of its defenses to bargaining

CSXT, however, refused to bargain over those notices, asserting in particular that the sale of its rail line was within the exclusive jurisdiction of the ICC and, therefore, any effort to enforce the Railway Labor Act's bargaining commands would be an impermissible collateral attack on the ICC's jurisdiction. D.A. at 860.

A. District Court Proceedings

After two subordinate units of petitioner UTU and their officers brought a suit against respondent in the Supreme Court for the State of New York (which respondent removed to the United States District Court for the Western District of New York) to enforce the Railway Labor Act's bargaining and statuts quo obligations, respondent brought a separate action against petitioners on October 29, 1987, in that federal court, seeking declaratory and injunctive relief. According to CSXT, rail labor had no right under the labor statute to require CSXT to bargain over the sale "because the ICC has exclusive jurisdiction over this transaction" and because the decision to sell a rail line is a "matter solely within [CSXT's] management prerogative." D.A. at 27-29. Besides asking the court to declare CSXT's rights as stated above, respondent also asked the court to enjoin rail labor from striking CSXT "in an effort to block or interfere with the sale or compel CSXT to agree to conditions not required by the ICC . . . ." D.A. at 30.

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over those notices, the claim that rail labor had waived the right to serve Section 6 notices by entering into agreements which barred such notices until April 1, 1988, rail labor served new notices on CSXT after April 1, 1988, to eliminate that argument. App. at 54a n.10. Those post-April, 1988 notices were served after the initial sale agreement had terminated and before the replacement agreement was signed at closing. Deferred Appendix in 2d Cir. No. 88-7461 [hereinafter, "D.A."] at 245-47.

Petitioners counterclaimed against respondent to enforce the Railway Labor Act's bargaining and status quo obligations and asked the court to enjoin CSXT from selling its rail line before it had complied fully with those statutory obligations. D.A. at 45.

In late March 1988, while this litigation was pending, CSXT posted notices that it would sell the Buffalo-Eidenau line on April 6, 1988, and that all of the employees who were working on that line—over 200 employees—would have their jobs abolished effective 11:59 p.m. on April 5, 1988. App. at 42a. CSXT, however, did not sell on April 6, for the district court ordered the carrier to maintain the status quo while it conducted a hearing on, and considered the cross-motions of the parties for injunctive relief. App. at 43a.

At that hearing, and in its request for a strike injunction, CSXT asserted that it had the "unilateral right," derived from its agreements with rail labor [4] and from its past practice,[5] to dispose of its rail lines without bargaining with rail labor. D.A. at 861. Since rail labor disputed that right, CSXT asserted, the controversy over its ability to sell during the Act's bargaining process was a "minor" dispute within the exclusive jurisdiction of the adjustment boards established under Section 3 of the Railway Labor Act, 45 U.S.C. § 153.

On May 26, 1988, the district court issued its decision concluding that CSXT was correct in asserting that the dispute between it and rail labor over whether it could sell its rail lines without first bargaining was a "minor"

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[4] That "right," CSXT asserted, came from the "Reduction-In-Force" provisions of its agreements that required a certain number of days notice before it abolished jobs. App. at 57a.

[5] That past practice consisted of various abandonments and ten sales of lines where, according to CSXT, rail labor had not insisted on bargaining. Rail labor, however, disputed CSXT's assertion that it had "acquiesced" to this "practice." App. at 58a-60a.

dispute subject to the exclusive jurisdiction of the adjustment boards.[6] According to the court (App. at 55a):

> The dispute between CSXT and its employees, in very basic terms, comes down to whether the carrier has the unilateral right to sell one of its less profitable line operations, and thereby abolish all CSXT positions on that line, without bargaining with the unions about protections for its employees who will be affected by that sale.

That dispute, the court concluded, should be classified as "minor," for CSXT had presented a "plausible interpretation" of the agreements that would support its claim of a contractual "right to sell the Buffalo-Eidenau line." App. at 58a.

Since the dispute was classified as a minor dispute, CSXT was permitted to proceed with the sale,[7] and rail labor was permanently enjoined from striking to prevent or otherwise to interfere with the sale. However, the court recognized the validity of the post-April 1, 1988 Section 6 notices (see, note 3, *supra*) and it ruled that "[w]hile CSXT can proceed with the sale of the line, CSXT is ordered to bargain with Defendant unions, consistent with the requirements of the Railway Labor Act, over notices served pursuant to Section 6 . . . on or after April 1, 1988, in connection with the sale of the Buffalo-Eidenau Line." App. at 65a-66a. CSXT did not appeal from that bargaining order.

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[6] The court also concluded, however, that CSXT was incorrect in asserting that the ICC's jurisdiction over rail line sales operated to relieve it of its obligations under the labor statute to bargain over rail labor's Section 6 notices. App. at 53a.

[7] The district court, however, entered a temporary stay of the sale pending appeal (App. at 70a), and the Second Circuit continued that stay. However, after the appeal was argued on July 18, 1988, the appellate court vacated that stay and CSXT consummated the sale at the end of that day. App. at 8a.

B. Appeal And Adjustment Board Ruling

Petitioners appealed from that injunction and judgment to the Second Circuit and, while that appeal was pending, submitted, along with CSXT, the dispute identified by the district court to a Special Board of Adjustment established pursuant to Section 3 Second of the Railway Labor Act, 45 U.S.C. § 153 Second. On December 15, 1988, while the appeal was pending decision by the appellate court, the adjustment board issued its award concluding that there was "nothing in the written agreements that gives [CSXT] the right to consummate a line sale without first bargaining under the Railway Labor Act." App. at 92a.[8] The Board also concluded that CSXT was incorrect in asserting that the past practices upon which it had relied had "attained contractual status enabling [CSXT] to sell the Buffalo-Eidenau Line without negotiating the effects of such a sale on affected employees." *Id.* In short, the Board concluded that the agreements neither authorized nor prohibited CSXT from disposing of its rail lines, but rather, were silent on this point.

After the adjustment board issued its award, petitioners asked the appellate court to vacate the strike injunction and to remand this case to the district court for consideration of rail labor's counterclaim to enforce the Railway Labor Act's bargaining and status quo commands. According to rail labor, the adjustment board's award made it unnecessary to consider whether the district court had properly classified the dispute as being a minor dispute. That motion was considered by the court of appeals along with the merits of rail labor's appeal, and on June 7, 1989, the court issued its decision which

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[8] CSXT has since challenged that award, asserting that the board decided an issue which the parties had not asked it to decide. *CSXT v. UTU, et al.*, W.D.N.Y. Civil Action No. 88-1404C. That suit is currently pending before the district court.

affirmed the district court's classification ruling and strike injunction, and denied rail labor's motion to vacate.

After concluding that the district court had properly classified the underlying dispute between rail labor and CSXT as being "minor" and within the exclusive jurisdiction of the adjustment boards (App. at 15a-25a), the appellate court addressed rail labor's motion to vacate the strike injunction because of the adjustment board's award. Rail labor's motion was denied, for the appellate court disagreed with petitioners' underlying premise, "believing that [petitioners'] contention rests upon a fundamental misconception of the RLA process for the resolution of major and minor disputes." App. at 26a.

According to the appellate court, once a dispute has been classified as being "minor," it is committed *forever* to the exclusive jurisdiction of the adjustment boards, and rail labor must look to that forum alone for whatever relief it might seek. App. at 28a-31a. Consequently, since the board had considered the dispute, the district court's directive that CSXT bargain over the post-April 1, 1988 Section 6 notices was "presumably moot" (App. at 22a), and there was no basis for a remand to the district court for consideration of rail labor's counterclaim to enforce the Railway Labor Act's *major* dispute resolution processes. App. at 29a-30a. As the court stated: "The district court concluded . . . , as we have, that the controversy is a minor dispute. The Board's arbitral determination does nothing to alter that conclusion, and indeed is in no way directed to that question." *Id.* Thus, the appellate court ordered that the strike injunction remain in place and instructed rail labor to look solely to the adjustment board process to obtain whatever relief might be appropriate in this case. App. at 30a-31a.

On June 22, 1989, petitioners asked the court of appeals to rehear its decision denying rail labor's motion to vacate, relying upon the recent decision of this Court in *Consolidated Rail Corp. v. Railway Labor Executives'*

Assoc., 491 U.S. —— (1989), which had been issued on June 19, 1989. In that decision, this court explained that the classification of a dispute as being minor, does not preclude "bargaining" for all time; rather, in a case where the board subsequently rejects the carrier's claim of a contractual right to change working conditions, such as occurred here, that classification decision merely delays bargaining "until the arbitration process is exhausted." Slip op. at 11. On August 29, 1989, the appellate court denied the petition for rehearing and the accompanying suggestion for rehearing *en banc*. App. at 73a. This petition has followed.

REASONS FOR GRANTING THE WRIT

This petition brings before this Court a question which is crucial to the orderly administration of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, but which should not exist because this Court addressed this very issue in *Consolidated Rail Corp. v. Railway Labor Executives' Assoc.* [hereinafter, *"Conrail"*], 491 U.S. —— (1989), and reached a result with which the Second Circuit's decision conflicts. Since this Court has so recently rejected the Second Circuit's conclusion that once a rail labor dispute is classified as being a "minor" dispute, it remains a minor dispute forever, there is no need for this Court to have this issue briefed and argued; rather, petitioners' submit, the proper disposition should be for this Court to grant the writ, summarily reverse the judgment of the Second Circuit, and remand this case to that Court for reconsideration in light of *Conrail*.[9]

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[9] Petitioners respectfully submit that if this Court grants the writ, but does not summarily reverse the Second Circuit's ruling, this Court should also consider the question of whether the lower courts properly characterized as being a minor dispute a controversy over what working conditions Sections 5 First and 6 of the Railway Labor Act, 45 U.S.C. § 155 First and § 156, required be maintained during the Act's bargaining processes. This issue is worthy of review by this Court because the lower courts' ruling on

I. This Petition Presents An Issue—The Proper Relationship Between Major And Minor Disputes—That Is Crucial To The Orderly Administration Of The Railway Labor Act's Dispute Resolution Processes

Congress has long been concerned that labor disputes in the rail industry not reach the level that rail transportation is interrupted, and since 1926, Congress has sought to achieve this goal of uninterrupted rail service by relying upon a statutory scheme—the Railway Labor Act—that fosters collective bargaining as the means to resolve labor disputes. This statutory scheme does not *ban* self-help by either party to resolve disputes over *changes* to existing rates of pay, rules, or working conditions, but rather, *bars* the use of self-help until after the parties have exhausted the Act's bargaining processes, which can include mediation and a presidential emergency board that is to investigate and report on the dispute. *E.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). Indeed, this bar on the premature use of self-help by either side is "central" to the design of the Act's scheme for the peaceful resolution of disputes over changes to existing agreements, including disputes over the formation of new agreements—*i.e.*, "major disputes." *Conrail*, slip op. at 3-4; *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S.

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this point is in conflict with the decisions of this Court in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Assoc.*, 491 U.S. —— (1989), and *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969), where the Court viewed as being an issue of statutory interpretation, and not contract interpretation, the issue of what working conditions must be preserved during the Act's bargaining processes. Moreover, this issue has been in dispute for decades, *compare, Rutland Ry. v. BLE*, 307 F.2d 21, 44 n.11 (2d Cir. 1962) (Marshall, J., dissenting), *cert. denied*, 372 U.S. 954 (1963), *with, Chicago & North Western Transportation Co. v. Railway Labor Executives' Assoc.*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S.Ct. 493 (1988), and in view of the diametrically different positions on this question (*see*, Brief for United States at 26-27, *Pittsburgh & Lake Erie R.R., supra*), will continue to recur until resolved by this Court.

142, 150 (1969). Congress has expressly provided that the parties cannot be compelled to arbitrate such disputes. 45 U.S.C. § 157 First.

Disputes over changes to existing agreements, however, are not the only type of dispute which can arise over rates of pay, rules and working conditions, for disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 U.S.C. § 153 First(i)) can also result in labor strife if allowed to remain unresolved. Since 1934, however, Congress has required that this type of labor dispute—*i.e.*, a "minor dispute"—be resolved by compulsory arbitration before an adjustment board, if unresolved by "conferences." *Conrail*, slip op. at 4-5. Unlike major disputes, though, there is no "general statutory obligation on the part of an employer to maintain the status quo pending" resolution of the minor dispute before an adjustment board. *Conrail*, slip op. at 5. Moreover, adjustment boards have exclusive jurisdiction over minor disputes which are unresolved by conferences. *Id.*

This difference in the methods to resolve major and minor disputes, and in particular the inapplicability of the status quo requirement to carrier actions taken in reliance on a disputed interpretation of contract in a minor dispute, has led the parties in many instances to classify disputes by looking to the results to be achieved by their label, and not by examining the underlying nature of the controversy. Moreover, petitioners respectfully submit, the fact that adjustment boards have exclusive jurisdiction over minor disputes has led some courts to classify disputes concerning changes as being minor disputes, because of a misdirected predisposition either to reduce their case loads or to prevent possible strikes.

Last term, this Court recognized the need for it to address this classification problem and it "articulated [in *Conrail*] an explicit standard for differentiating between

major and minor disputes" under the Railway Labor Act. Slip op. at 3. However, petitioners respectfully submit, the fact that this Court has now articulated such a standard does not detract from the importance of a proper understanding of the relationship between major and minor disputes, nor does it lessen the need for this Court to assure that the lower federal courts adhere to the teachings of this Court on that relationship. Indeed, if the Act is to function as Congress has intended, it is crucial that the lower courts not relegate to the exclusive jurisdiction of the adjustment boards disputes which Congress has provided are to be resolved by bargaining and *then*, if still unresolved after being subject to the Act's major dispute resolution process, by self-help.

Unfortunately, the Second Circuit, even after this Court's decision in *Conrail* was brought to its attention, refused to rehear its conclusion that adjustment boards, once a dispute was found to involve an issue of contract interpretation, were expected to resolve *all* aspects of the dispute, including those that were outside of the narrow jurisdiction which Congress has given those boards. Whether or not adjustment boards retain jurisdiction over disputes once they perform their narrow statutory duties and resolve the contract interpretation issue, is a question that clearly is important to the proper functioning of the Act's dispute resolution processes.

Moreover, in view of this Court's rejection of the "hybrid dispute" concept in *Conrail*, slip op. at 8-12, the proper understanding of what is to occur once an adjustment board rejects a carrier's claim that it has the contractual right to make a change, is crucial to the entire rail industry. This is especially true in cases, such as that involved here and in other line sale cases, where the disputed change is *neither authorized nor provided by* the existing contract. Railroads must understand the consequences of their actions in changing those working conditions based on a claimed contractual right which even

they recognize is not likely to prevail before an adjustment board. Indeed, the only way that this long-standing dispute over line-sales will be resolved, short of congressional involvement, is by collective bargaining. But, until the unecrtainty that currently exists over labor's right to bargain is resolved, the industry will look to the courts to frustrate that bargaining. The Second Circuit's decision, by relegating rail labor to a dispute resolution forum that has no jurisdiction to create the needed agreements, and by affirming the permanent strike injunction, has effectively nullified the district court's unappealed bargaining order and, thus, has given CSXT and other railroads a strong incentive to refuse to negotiate a solution to the line sale dispute.

II. The Second Circuit's Decision Requiring Petitioners To Look To The Adjustment Boards For Relief From CSXT's Violations Of The Railway Labor Act's Bargaining And Status Quo Commands Is In Direct Conflict With This Court's Decision In *Conrail*

In most rail labor cases involving claims by employees under Section 2 Seventh of the Act, 45 U.S.C. § 152 Seventh, that a carrier has changed working conditions in a manner that is not prescribed either in the agreement or in Section 6 of the Railwal Labor Act, and a carrier defends on the grounds that its actions are justified by the agreement, an adjustment board will be able to give complete relief regardless of whether it accepts or rejects the carrier's defense. This, however, will be true *only* if the disputed change, which is found by the board to be unauthorized, *violates* an agreement.

However, as this Court has recognized in *Conrail*, slip op. at 10 n.7, and in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Assoc.*, 491 U.S. —— (1989), slip op. at 13-14 n.15 and accompanying text, not all rail working conditions are established by express or implied agreements. Rather, there exists in the railroad industry a substantial area of conduct which has been "satisfac-

torily tolerable to both sides, [and, thus,] . . . omitted from the agreement[s]. . . ." *Detroit & Toledo Shore Line*, 396 U.S. at 155. When this type of non-agreement working condition is at the heart of the dispute, an adjustment board cannot grant the employees any relief if the board determines that the carrier's claim of contractual right is without merit. This is so for essentially two reasons. First, adjustment boards can only interpret existing contracts; they cannot create new ones. *E.g.*, *Hearings on H.R. 7650 Before House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess. at 64 (1934) (Statement of Commissioner Joseph B. Eastman). And second, in such a situation, if there is a violation of an employee-right to be remedied, it will be a violation of the Railway Labor Act's status quo obligation; adjustment boards do not have jurisdiction to interpret or to enforce that statutory command. *E.g.*, *Air Cargo Inc. v. IBT*, 733 F.2d 241, 246-47 (2d Cir. 1984).

Also, adjustment boards lack the ability to grant make-whole relief to employees who are injured when a carrier changes rules or working conditions in violation of Section 2 Seventh of the Act, but *not* in violation of the agreement itself. Again, since adjustment boards cannot create or modify agreements, those boards cannot remedy a *change* in agreements that is not also a *breach* of that contract. And again, any injury to the employees would result from a *violation of statute—i.e.*, Section 2 Seventh—which adjustment boards have no jurisdiction to enforce.

In ruling that petitioners must look solely to the Special Board of Adjustment for relief in this case, the Second Circuit failed to recognize that no employee-contractual right has been violated in this case. Rather, the rights which have been violated are rights created by statute; but, those rights cannot be considered or remedied by the adjustment boards.

In this case, the district court found that CSXT's actions in selling the Buffalo-Eidenau line would change the

seniority rights of the employees, for, as the Court stated (App. at 44a):

> [W]hile the work which CSXT employees are currently performing on the Buffalo-Eidenau line will remain in existence when the line is sold, current employees who enjoy contractual seniority rights to that work will not be able to exercise those rights once the line is sold, and the work transferred to the B&P.

That *change* in seniority rights, however, did not *violate* the agreements for, as the adjustment board noted, CSXT was "not precluded, by agreement or otherwise, from *selling its assets* pursuant to ICC approval." App. at 88a (emphasis in original). But as the adjustment board also concluded, neither was CSXT authorized by its collective bargaining agreements, either express or implied, to sell its assets. Thus, whether or not CSXT violated Section 2 Seventh of the labor statute when it sold its rail line, presents a question over which the adjustment board has no jurisdiction to address or to remedy.

Also, in this case rail labor's Section 6 notices triggered the Act's status quo obligation and, thus, CSXT was obligated by the labor statute "to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Detroit & Toledo Shore Line*, 396 U.S. at 153 (footnote omitted). Since performing operations for CSXT over the Buffalo-Eidenau line was part of the actual, objective working conditions of the employees, and was involved in or related to the dispute raised by rail labor's Section 6 notices, CSXT could not change that practice by selling unless rail labor had waived bargaining. *Pittsburgh & Lake Erie R.R.*, slip op. at 16-17; *Detroit & Toledo Shore Line*, 396 U.S. at 154. Thus, once the adjustment board rejected CSXT's claim of a contractual right to sell with-

out bargaining, whatever justification the lower courts had to decline to exercise jurisdiction over this dispute (and we submit there was no such justification) disappeared, for only federal courts have jurisdiction to consider and remedy a violation of the Act's status quo obligation.

Several days after the Second Circuit issued its decision, this Court issued its ruling in *Conrail* and in that decision addressed this very issue. Rail labor had argued in *Conrail* that there was a class of disputes over rates of pay, rules or working conditions, which it called a "hybrid dispute," that did not fit either the major or minor category. That type of dispute, rail labor asserted, involved cases where the carrier makes a change in working conditions and then defends against a "Section 2 Seventh suit" by asserting that it had the contractual right to make the change. Brief for Respondent at 34-35, *Conrail*. In such a case, rail labor contended, the adjustment board had jurisdiction to consider the carrier's contractual defense, but the railroad must forego unilateral implementation of the change until the board has reached its decision. *Conrail*, slip op. at 9.

This Court rejected that argument because, it concluded, rail labor's "approach unduly constrains the freedom of unions and employers to contract for discretion." *Conrail*, slip op. at 9. But in rejecting rail labor's "hybrid dispute" theory, this Court stated that the "effect of this ruling . . . will be to delay collective bargaining in some cases until the arbitration process is exhausted." Slip op. at 11. As this Court added (*id.* at 11-12; emphasis added):

> Full utilization of the [Adjustment] Board's procedures . . . will diminish the risk of interruptions in commerce. Failure of the "virtually endless" process of negotiation and mediation established by the RLA for major disputes, . . . frees the parties to employ a broad range of economic selfhelp, which may dis-

> turb transportation services throughout the industry, and unsettle employer-employee relationships. . . . *Delaying the onset of that process until the Board determines on the merits that the employer's interpretation of the agreement is incorrect* will assure that the risks of selfhelp are not needlessly undertaken . . . .

Although the import of that ruling is self-evident, Justice White's concurring opinion in *Conrail* is more explicit and directly on point to this case: "If the Board decides that the company is wrong about its authority under the contract, the result will be that the company has sought a change in the contract without invoking the procedures applicable to major disputes."

This view of the relationships between the major and minor disputes resolution processes, and between federal court and adjustment board jurisdictions, as not being mutually exclusive, is consistent with this Court's earlier decision in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567-68 (1946). In *Pitney*, this Court concluded that a court *adjudicating* a claimed violation of Section 2 Seventh,[10] where the meaning of the contract has been placed in dispute, "should exercise equitable discretion to give that agency [*i.e.*, an adjustment board] the first opportunity to pass on the issue." 326 U.S. at 567. And as the court stated (326 U.S. at 568; footnote omitted):

> The dismissal of the cause should therefore be stayed by the District Court, so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly

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[10] *Pitney* involved a district court sitting as a railroad reorganization court under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1976) (repealed), which was acting in two roles: one, as a "carrier" supervising the trustee in administering the estate (325 U.S. at 565), and the other as an adjudicator with jurisdiction to enforce Section 2 Seventh. 326 U.S. at 565-66. This Court affirmed the lower court's actions as the trustee's supervisor, but not as an adjudicator. 326 U.S. at 567-68.

> revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding.

See, Mitchell Coal & Coke Co. v. Pennsylvania R.R., 230 U.S. 247 (1913), which this Court cited in support of the above quoted statement.

In short, this Court has clearly stated in *Conrail* that the classification of a dispute as being a minor dispute does not, for all time, commit the entire controversy to the exclusive jurisdiction of the adjustment boards as the Second Circuit held. Rather, the adjustment board has exclusive jurisdiction to decide *only* the contract interpretation issue, and once that issue is decided adversely to the carrier, the Act's bargaining process becomes enforceable by the courts, or by the methods set forth in the Act for major disputes.

Since the Second Circuit refused to rehear its decision in light of *Conrail*, this Court should grant this petition, summarily reverse the Second Circuit and remand for further consideration in light of *Conrail*.

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that the writ be granted, the judgment of the Second Circuit be reversed summarily, and this case be remanded to that court for further consideration in light of this Court's decision in *Conrail*.

Respectfully submitted,

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Date: October 6, 1989

APPENDIX

APPENDIX

APPENDIX I

LIST OF PETITIONERS

United Transportation Union [UTU], F.A. Hardin (President, UTU), and J.A. Cianciotti (General Chairman, UTU (E));

UTU, Yardmasters Department [RYA], B.R. Carver (Assistant to President, RYA), and Richard P. DeGenova (General Chairman, UTU (RYA));

American Train Dispatchers Association [ATDA], R.J. Irvin (President, ATDA), and D.W. Branham (General Chairman, ATDA);

Brotherhood of Maintenance of Way Employes [BMWE], G.N. Zeh (President, BMWE), and B.J. Twigg (Executive Board, BMWE);

Transportation • Communications International Union [TCU] (formerly Brotherhood of Railway, Airline and Steamship Clerks [BRAC]), R.I. Kilroy (International President, TCU), Dwight D. Vance (General Chairman, C&O System Board, BRAC), and L.H. Tackett (General Chairman, B&O System Board, BRAC);

Brotherhood of Locomotive Engineers [BLE], L.D. McFather (President, BLE), and J.A. LeClair (General Chairman, B&O Committee);

TCU, Carmen Division [Carmen], W. Fairchild (President, Carmen), and M.L. Crawford (General Chairman, B&O Carmen);

International Association of Machinists and Aerospace Workers [IAM], J.F. Peterpaul (Vice President, IAM), A.J. Sarcone (General Chairman, IAM District 22), and W.D. Snell (Assistant President/Directing General Chairman, IAM District 22);

International Brotherhood of Firemen and Oilers [IBF&O], J.L. Walker (International President, IBF&O), and D.S. Anderson (General Chairman, System Council No. 6, IBF&O);

Sheetmetal Workers International Association [SMWIA], A.R. Hicks (General Chairman, SMWIA), and D.C. Buchanan (Dir. Railroad Workers, SMWIA);

International Brotherhood of Electrical Workers [IBEW], E.P. McEntee (International Vice President, IBEW), and George L. Laitile (General Chairman, IBEW); and

Brotherhood of Railroad Signalmen [BRS], V.M. Speakman, Jr. (President, BRS), and C.T. Green (General Chairman, B&O System Committee, BRS).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

CSX TRANSPORTATION INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN O'B. CLARKE, JR.
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1554—August Term 1987

(Argued: July 18, 1988 Decided: June 7, 1989)

Docket No. 88-7461

CSX TRANSPORTATION, INC.,
Plaintiff-Appellee,

v.

UNITED TRANSPORTATION UNION, *et al.*,
Defendants-Appellants.

Before:

ALTIMARI and MAHONEY,
Circuit Judges,
and DEARIE,
*District Judge.**

Appeal from an order of the United States District Court for the Western District of New York, John T. Curtin, *Judge*, granting a permanent injunction barring defendants-appellants, certain labor organizations and officers thereof, from striking against CSX Transportation, Inc. to prevent its sale of a rail line. While the appeal was pending, defendants-appellants moved to vacate the

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* The Honorable Raymond J. Dearie, United States District Judge for the Eastern District of New York, sitting by designation.

injunction and remand the case on the basis of an intervening arbitration award concerning the subject matter of this litigation.

The order granting a permanent injunction is affirmed. The motion to vacate and remand is denied.

JOHN O'B. CLARKE, JR., Washington, D.C. (Highsaw & Mahoney, P.C., Washington, D.C., John F. Collins, Collins, Collins & DiNardo, Buffalo, New York, of counsel), *for Appellants.*

RONALD M. JOHNSON, Washington, D.C. (Brett A. Perlman, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., Courtland R. LaVallee, Moot & Sprague, Buffalo, New York, T.L. Samuel, Nicholas S. Yuvanovic, CSX Transportation, Inc., Jacksonville, Florida, of counsel), *for Appellee.*

MAHONEY, *Circuit Judge*:

This appeal presents for review an order of the United States District Court for the Western District of New York, John T. Curtin, *Judge*, which granted a permanent injunction barring defendants-appellants, certain labor organizations and officers thereof, from engaging in any "strike, picketing, patrolling, self-help or disruptive behavior" to prevent or interfere with the sale by CSX Transportation, Inc. ("CSX") of a line of railroad between Buffalo, New York and Eidenau, Pennsylvania (the "Buffalo-Eidenau line") to the Buffalo and Pittsburgh Railroad, Inc. ("B&P"), a newly formed corporation.

The specific question presented to the district court by this action for injunctive and declaratory relief was whether CSX was obliged to refrain from completing the sale of the Buffalo-Eidenau line pending bargaining under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188

(1982), over the effects of the sale on the employees of that line. The Interstate Commerce Commission ("ICC") had granted expedited approval of the proposed sale without imposition of labor protective conditions.

In the opinion below, *Decker v. CSX Transp., Inc.*, 688 F. Supp. 98 (W.D.N.Y. 1988) (*"Decker II"*), the district court first determined that the dispute resolution processes of the RLA were not preempted by the ICC's authorization of the line sale. *Id.* at 107-09. The court went on to hold, however, that the controversy between CSX and appellants should be categorized as a "minor dispute" under the RLA, since a "plausible interpretation" of the pertinent agreements between the parties (the "Agreements") would justify CSX's action in selling the Buffalo-Eidenau line without prior bargaining with appellants concerning the affected employees. *Id.* at 109-12. The district court accordingly determined that the controversy was "subject to the RLA's formal grievance process while the sale goes through," *id.* at 109, and enjoined appellants from striking to prevent or impede the sale of the Buffalo-Eidenau line.

In accordance with the district court order, the parties brought this dispute before Special Board of Adjustment No. 1018 (the "Board") for arbitration pursuant to RLA § 3 Second, 45 U.S.C. § 153 Second (1982). On December 15, 1988, while this appeal was pending, the Board determined that CSX did not "have the unilateral right, under existing collective bargaining agreements or past practice, to abolish its position in connection with the sale of the Buffalo-Eidenau line without first negotiating with the [appellant unions] as to the affected employees." Board Determination dated December 15, 1988 at 5, 21. Appellants then moved this court to vacate and remand based upon the Board's decision.

The order of the district court granting a permanent injunction is affirmed. Appellants' post-argument motion to vacate and remand is denied.

Background

CSX is a Class 1 railroad, *see* 45 U.S.C. § 151 First (1982), subject to the jurisdiction of the ICC under the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10101-11917 (1982 & Supp. IV 1986). CSX is also a "carrier" within the meaning of the RLA, *see* 45 U.S.C. § 151 First (1982), and thus subject to its directives regarding labor relations. Appellants are labor organizations and certain named officers of those organizations which represent various crafts or classes of CSX employees. They are "representatives" within the meaning of the RLA, *see* 45 U.S.C. § 151 Sixth (1982).

CSX owns and operates over 21,000 miles of rail lines in twenty states and in the province of Ontario, Canada. Prior to July 19, 1988, this system included a 369-mile line of railroad between Buffalo, New York and Eidenau, Pennsylvania. The Buffalo-Eidenau line had formerly been part of the Baltimore and Ohio Railroad ("B&O"), which was merged into CSX in 1987. CSX administered all collective bargaining agreements between the former B&O and the unions representing employees on the Buffalo-Eidenau line.

CSX had for some time sought a buyer for the Buffalo-Eidenau line because traffic on that line had decreased to a point of marginality (defined by testimony in the district court as the point where a line is not earning the corporate rate of return on investment, or is experiencing a traffic loss which, if uncorrected, would lead to eventual abandonment). In the late summer of 1987, CSX found a prospective purchaser for the Buffalo-Eidenau line, B&P. At that time, the CSX corporate rate of return was 11.5%, and the rate of return on the Buffalo-Eidenau line was 1.4%.

Upon learning of CSX's intention to sell, several appellant unions served notices upon CSX pursuant to RLA § 6, 45 U.S.C. § 156 (1982), of "an intended change in

agreements affecting rates of pay, rules, or working conditions," *id.* The unions sought thereby to preserve the status quo until the effects of the proposed sale on railroad employees could be assessed and negotiated. CSX responded that these notices violated the moratorium provisions of the Agreements,[1] and that in any event, the sale of the Buffalo-Eidenau line was subject to the ICC's exclusive jurisdiction, rendering the status quo requirements of the RLA inapplicable.

On August 31, 1987, representatives of the United Transportation Union ("UTU"), a defendant-appellant here, filed suit against CSX in New York State Supreme Court to enjoin CSX from altering the status quo as it existed with respect to the Buffalo-Eidenau line on the date the first Section 6 notices were filed. The case was thereafter removed to the United States District Court for the Western District of New York.

On September 16, 1987, CSX entered into a letter of intent with B&P to sell the Buffalo-Eidenau line to B&P. Shortly thereafter, B&P filed a notice of exemption with the ICC under 49 C.F.R. § 1150.31 (1987) for exemption from the prior approval requirements of 49 U.S.C. § 10901 (1982). *See Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985) (rulemaking proceeding where a class of such transactions was initially exempted from regulation under § 10901), *review denied mem. sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987). The exemption was granted and became effective on September 29, 1987. By order dated October 13, 1987, the ICC denied a UTU request for a stay of the exemption's effectiveness.

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[1] A typical moratorium provision under the Agreements stated:

> [N]o party to the Agreement shall serve, prior to April 1, 1988 (not to become effective before July 1, 1988), any notice or proposal for the purpose of changing the subject matter of the provisions of this Agreement . . . .

B&P's corporate parents also joined B&P in seeking an exemption pursuant to 49 U.S.C. 10505 (1982) from the common control approval requirements of 49 U.S.C. § 11343 (1982). An ICC order dated December 21, 1987 granted the exemption, thereby authorizing B&P's parent corporations to control B&P and paving the way for the sale of the Buffalo-Eidenau line to be completed. *Genesee & Wyoming Industries, Inc., The Arthur T. Walker Estate Corp., Dumaines and B. & P. R.R. Exemption—Continuance in Control,* I.C.C. Decision Finance Docket No. 31117 (December 21, 1987).

Meanwhile, on November 3, 1987, the district court dismissed UTU's complaint in the removed injunction action in reliance upon this Court's decision in *RLEA v. Staten Island R.R. Corp.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987), reasoning that the requested issuance of a status quo injunction would impermissibly interfere with the ICC's order of exemption. *Decker v. CSX Transp., Inc.*, 672 F. Supp. 674 (W.D.N.Y. 1987) (*"Decker I"*), *vacated*, 688 F. Supp. 98 (W.D.N.Y. 1988).

On October 29, 1987, just prior to that dismissal, CSX commenced the instant action against UTU, eleven other labor organizations and twenty-seven union officials. The complaint sought a declaratory judgment that CSX was under no statutory obligation to negotiate with defendants with respect to the proposed sale of the Buffalo-Eidenau line to B&P, and an injunction preventing the unions from "exercising any self-help including, without limitation, a strike" in order to prevent or impede the sale.

Before answering the complaint in the instant action, appellants moved the district court to reconsider and vacate its order of dismissal in *Decker I*, pursuant to Fed.R.Civ.P. 59(a)(2), and to consolidate the two actions, pursuant to Fed. R. Civ. P. 42(a). Appellants then answered CSX's complaint, asserting a counterclaim for judgment against CSX requiring that the status quo be maintained until "all [RLA] major dispute resolution

processes have been exhausted," and enjoining any sale of the Buffalo-Eidenau line pending such exhaustion. Appellants also moved to dismiss CSX's complaint, insofar as it requested an injunction against a strike, on the ground that section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1982), deprived the Court of jurisdiction to enjoin strike activity,[2] and for a preliminary injunction barring CSX from altering the rates of pay, rules, and working conditions of its employees on the Buffalo-Eidenau line *pendente lite.*

On March 26, 1988, CSX posted notices that the sale of the Buffalo-Eidenau line would be completed on April 6, 1988, and that just prior to that date certain jobs on the line would be abolished. Pursuant to the sales agreement, B&P had an obligation to offer employment to at least 160 of the approximately 226 CSX employees then working on the Buffalo-Eidenau line. As of May 26, 1988 (the date *Decker II* was decided), B&P had made job offers to 184 of these employees, of which 113 had been accepted. The sales agreement, however, did not require B&P to assume the administration of the Agreements, thus enabling B&P to establish its own terms of employment and related agreements with these employees.

On April 5, 1988, the district court ordered an evidentiary hearing on all the pending motions. That hearing was held on April 13-19, 1988. In the meantime, the court ordered that the status quo be maintained until a decision on the motions was rendered.

On May 26, 1988, the district court issued its decision. The court vacated its order in *Decker I*, and consolidated that case with *Decker II*, concluding that it had erred in in its initial ruling that the ICA precluded application of the RLA to the Buffalo-Eidenau dispute. *See Decker*

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[2] This contention was not pursued on appeal. *Cf. Long Island R.R. v. IAM*, No. 87-7297, slip op. at 2606-08 (2d Cir. April 10, 1989) (discussing interplay between RLA and Norris-LaGuardia Act regarding injunctions in labor disputes).

II, 688 F. Supp. at 107-109.[3] In so concluding, the district court relied upon the Third Circuit's decision in *RLEA v. Pittsburgh & L.E. R.R.*, 845 F.2d 420 (3d Cir. 1988), *cert. granted*, 109 S. Ct. 489 (1988), which held that the ICA did not preempt the field of labor protection in rail transportation transactions.

The district court accordingly undertook an analysis of the relevant provisions of the RLA, and determined that the instant action presented a "minor dispute" under settled principles governing the resolution of RLA controversies. *Decker II*, 688 F. Supp. at 109-112. The court held that CSX's claimed contractual defense was "plausible" under the language of the relevant collective bargaining agreements, and the dispute was therefore subject to binding arbitration under the exclusive jurisdiction of RLA adjustment boards. *Id.*; *see* RLA § 3, 45 U.S.C. § 153 (1982).

On June 2, 1988, the district court entered an order enjoining appellants from engaging in any strike or other concerted activity to prevent or impede the sale of the Buffalo-Eidenau line; requiring CSX to bargain with appellants over "notices served pursuant to Section 6 of the Railway Labor Act, 45 U.S.C. § 156, on or after April 1, 1988, in connection with the sale of the Buffalo-Eidenau Line," *see supra* note 1, while permitting the sale of the Buffalo-Eidenau line to proceed; and denying appellants' application for further declaratory and injunctive relief. The court also stayed its permission of the sale of the Buffalo-Eidenau line until June 16, 1988 to allow time for an application to this court concerning the matter. This court extended that stay pending expedited appeal. The stay was subsequently vacated on July 18, 1988 after oral argument, and the sale was completed on July 19, 1988.

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[3] The ruling vacating the prior order has not been appealed, and we accordingly do not address that ruling.

On July 15, 1988, just prior to the oral argument of the instant appeal, the parties submitted their dispute concerning the sale of the Buffalo-Eidenau line to the Board for arbitration pursuant to RLA § 3 Second, 45 U.S.C. § 153 Second (1982). A hearing was conducted on October 18, 1988, and as indicated earlier, the Board decided in favor of appellants on December, 15, 1988, concluding that: "there is no written language support [in the Agreements] for [CSX's] position," Board determination at 18; and that past practice did not authorize a sale of the Buffalo-Eidenau line by CSX without bargaining over the sale's effects on employees because appellants had never "relinquished their right to seek protection, by whatever means, for their affected members," *id.* at 20. The concluding "Award" of the Board Determination, however, stated only that: "The questions set before the Board are disposed of as provided in the Findings and Conclusions herein." *Id.* at 26.

Appellants thereafter moved this court to vacate the district court order (and the permanent injunction therein granted) and remand for consideration of appellants' counterclaims, "[s]ince there is no longer a basis for concluding that appellee [CSX] has a contractual right to abolish jobs without first bargaining." This opinion accordingly addresses both the original appeal and appellants' post-argument motion.

We are advised by the parties in their submissions on the pending motion that CSX has initiated an action in the United States District Court for the Western District of New York to review the Board's determination pursuant to RLA § 3 First (q), 45 U.S.C. § 153 First (q) (1982).

Discussion

A. *The Applicable Law.*

Determinations regarding the major or minor nature of a dispute under the RLA are questions of law which circuit courts review *de novo*. *IAM, Lodge No. 19 v. Soo*

Line R.R., 850 F.2d 368, 374 (8th Cir. 1988); *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 838 F.2d 1087, 1089 (9th Cir. 1988).

The RLA was enacted in 1926 to regulate labor relations in the nation's railroads and to prevent interruptions in rail service by encouraging labor peace while avoiding rail strikes. *See* 45 U.S.C. § 151(a) (1982); *Detroit & T. Shore Line R.R. v. UTU*, 396 U.S. 142, 148 (1969). The statute provides two distinct dispute resolution schemes designed to accomplish these purposes. These schemes were clearly differentiated by the Supreme Court in *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945). In that case, the Court construed the RLA to address two classes of controversy, "major" and "minor" disputes, stating:

> [I]t is clear from the [Railway Labor] Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of differences between the two classes of controversy.
>
> The first [major disputes] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> The second class [minor disputes], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a

> particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.
>
> In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world.

Id. at 722-23 (footnote omitted).[4]

This court has also addressed the distinction between major and minor disputes:

> It is a major dispute if the present agreements between the railroad and the brotherhoods contain ex-

---

[4] The concluding statement that the quoted description corresponds "[i]n general" to the "major and minor disputes of the railway labor world" can engender confusion, since the "major" and "minor" dispute terminology employed in *Elgin* does not appear in the statutory language of the RLA, but has generally been adopted in the cases subsequent to *Elgin*. As will be described in greater detail immediately hereinafter, a system of compulsory arbitration before the National Railroad Adjustment Board is provided for the resolution of "minor" disputes. A system of mediation before the National Mediation Board is provided, on the other hand, for the resolution not only of any "dispute concerning changes in rates of pay, rules or working conditions not adjusted by the parties in conference, *see* RLA § 5 First (a), 45 U.S.C. § 155 First (a) (1982), a category which corresponds generally with the *Elgin* description of "major" disputes; but also of "[*a*]*ny other dispute* not referable to the National Railroad Adjustment Board," *see id.* § 5 First (b), 45 U.S.C. § 155 First (b) (1982) (emphasis added). It would therefore appear that the RLA adopts a comprehensive scheme which addresses *all* disputes between RLA carriers and employee representatives, and that the category of disputes amenable to RLA mediation procedures is accordingly not confined to the *Elgin* description of those which "in general" are "regarded traditionally" as "major".

> press provisions contrary to the position taken by the railroads or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; and it is also minor if what the railroad seeks to do is supported by customary and ordinary interpretations of the language of the agreements.

Rutland Ry. Corp. v. Brotherhood of Locomotive Eng'rs, 307 F.2d 21, 33-34 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

The "major dispute" procedure is initiated by a carrier or union providing at least thirty days' written notice (a "Section 6 notice") "of an intended change in agreements affecting rates of pay, rules or working conditions" pursuant to RLA § 6, 45 U.S.C. § 156 (1982). The first phase of the resolution scheme is mandatory negotiation between the parties. *Id.* Failing agreement, either party may request mediation by the National Mediation Board ("NMB"), or the NMB may proffer its services "in case any labor emergency is found by it to exist at any time." RLA § 5 First, 45 U.S.C. § 155 First (1982); *see generally* RLA §§ 4 (establishing the NMB) and 5 (describing its functions), 45 U.S.C. §§ 154 and 155 (1982). In either event, mediation before the NMB then takes place.

If the NMB determines after mediation that the parties have reached an impasse, the NMB must "endeavor . . . to induce the parties to submit their controversy to arbitration," RLA § 5 First, 45 U.S.C. § 155 First (1982), but arbitration may occur only if the parties agree thereto, *id.* § 7 First, 45 U.S.C. § 157 First (1982). Unless the parties agree to arbitration, there is a further thirty-day "cooling off" period during which the status quo must be maintained, RLA § 5 First, 45 U.S.C. § 155 First (1982), after which they may resort to economic

self-help; *i.e.*, the union may strike and the carrier may unilaterally change terms and conditions of employment. In addition, if the NMB concludes that an unresolved major dispute "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute." RLA § 10, 45 U.S.C. § 160 (1982). In that event, the parties must maintain the status quo until "thirty days after such board has made its report to the President." *Id.*

Once a party has served a Section 6 notice, the status quo must be maintained until the negotiation, mediation and cooling off periods have expired. *Shore Line*, 396 U.S. at 150-53. The RLA's major dispute process has been described as "purposely long and drawn out. . . ." *Brotherhood of Ry. & Steamship Clerks v. Florida E. Coast Ry.*, 384 U.S. 238, 246 (1966). While parties are required to submit to the successive negotiation, mediation, and cooling off phases of the major dispute resolution scheme, this requirement only ensures that the procedures will be exhausted; "[n]o authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." *Elgin*, 325 U.S. at 725.

The RLA provides a very different regimen for the resolution of "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." [5]

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[5] It is noteworthy that the dispute resolution process next to be considered applies not only to the "minor" disputes described in *Elgin*, 325 U.S. at 723, but also to "disputes . . . growing out of grievances." *Compare supra* note 4, pointing out that the RLA mediation procedures apply to all non-arbitrable disputes, whether or not falling within the "general" *Elgin* description of "major" disputes.

After the initial negotiation stage, parties are not free to agree or disagree at will. Rather, either party may submit the dispute for resolution through *binding* arbitration to the National Railroad Adjustment Board ("NRAB"), 45 U.S.C. § 153, First (i) (1982), or to other boards of adjustment upon which the parties agree, 45 U.S.C. § 153 Second (1982).

The status quo provisions of the RLA generally do not apply in minor disputes, enabling the carrier to act on its own interpretation pending arbitration.[6] *Burlington N. R.R. v. UTU*, 862 F.2d 1266, 1272 (7th Cir. 1988); *Maine Cent. R.R. v. UTU*, 787 F.2d 780, 781 (1st Cir.), *cert. denied*, 479 U.S. 848 (1986); *Local 553, Transport Workers Unions v. Eastern Air Lines*, 695 F.2d 668, 675 (2d Cir. 1982); *Empresa Ecuatoriana de Aviacion, S.A. v. District Lodge No. 100*, 690 F.2d 838, 844 (11th Cir. 1982), *cert. dismissed*, 463 U.S. 1250 (1983). A strike over a minor dispute is illegal because it undermines the exclusive jurisdiction of the adjustment board, *see Burlington*, 862 F.2d at 1272; *Chicago & N.W. Transp. Co. v. RLEA*, 855 F.2d 1277, 1283, 1287 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 493 (1988); *Empresa Ecuatoriana*, 690 F.2d at 844, and federal courts may enjoin such strikes. *Brotherhood of R. R. Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30 (1957); *Empresa Ecuatoriana*, 690 F.2d at 844. The NRAB has broad authority in minor disputes to grant relief and make employees whole if the unions ultimately prevail before the Board. *See, e.g., Brotherhood of R.R. Trainmen v. Central of Georgia Ry.*, 415 F.2d 403, 415 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970); *International Bhd. of Firemen v. Consolidated Rail Corp.*, 560 F. Supp. 169, 178 (S.D. Ohio 1982).

In cases where a carrier contends that a given controversy is a minor dispute, courts have typically looked

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[6] *But see infra* note 10.

to the pertinent collective bargaining agreements to determine whether a "plausible interpretation would justify the carrier's action." *Local 553*, 695 F.2d at 673; *see Baylis v. Marriot Corp.*, 843 F.2d 658, 663 (2d Cir. 1988). "A dispute is major if the carrier's contractual justification for its actions is 'obviously insubstantial.'" *Local 553*, 695 F.2d at 673 (quoting *UTU v. Penn Central Transp. Co.*, 505 F.2d 542, 544 (3d Cir. 1974) (per curiam)). A dispute will be considered minor, on the other hand, if the contract is "reasonably susceptible" to the carrier's interpretation. *Id.* (quoting *UTU v. Burlington N., Inc.*, 458 F.2d 354, 357 (8th Cir. 1972)).

It must therefore be determined whether the carrier's contractual position is "so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by § 6 for alteration of existing agreements." *Southern Ry. v. Brotherhood of Locomotive Firemen*, 384 F.2d 323, 327 (D.C. Cir. 1967); *see National Ry. Labor Conference v. IAM*, 830 F.2d 741, 746 (7th Cir. 1987); *Atchison, T. & S.F. Ry. v. UTU*, 734 F.2d 317, 321 (7th Cir. 1984). This approach is consistent with the concern for minimizing the occurrence of strikes in the rail transportation industry. *See Chicago & N.W. Transp.*, 855 F.2d at 1283. Finally, "customary and ordinary interpretations of the language of the agreements," *see Rutland*, 307 F.2d at 34, as well as prior practice between the parties, *see Shore Line*, 396 U.S. at 153-55, may be considered.[7]

B. *Characterizing the Present Dispute.*

Based upon the principles articulated above, the district court found that a "plausible interpretation of the collective bargaining agreements in effect between [CSX]

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[7] As noted in *ALPA v. Eastern Air Lines*, 863 F.2d 891, 896 (D.C. Cir. 1988), "[a]lthough [*Shore Line*] dealt with the working conditions that constitute the status quo, subsequent courts have inferred from the holding that past practice is a relevant consideration in the dispute classification process as well."

and the defendant unions would provide a substantial contractual justification for the sale of the Buffalo-Eidenau line without additional bargaining." *Decker II*, 688 F. Supp. at 112. The dispute between the parties was accordingly deemed minor and subject to binding arbitration before an adjustment board, *id.*, pursuant to RLA § 3, 45 U.S.C. § 153 (1982).

Appellants contend, however, that the dispute arises from an action by CSX which will change existing employment rights of CSX employees as currently embodied in the Agreements, and as presenting a legitimate attempt by appellants to negotiate *new* agreements for the affected employees.

The district court's finding that the dispute was minor was grounded on two bases: 1) the existence of various reduction-in-force ("RIF") provisions in the Agreements, *Decker II*, 688 F. Supp. at 110-11; and 2) CSX's allegedly established practice of selling or abandoning rail lines without engaging in RLA bargaining over related job abolitions, *id.* at 111-12. We next consider these matters.

1. *Textual provisions of the collective bargaining agreements.*

CSX's principal argument that the instant dispute is covered in the Agreements is premised upon the RIF provisions of those Agreements. The district court cited a typical RIF clause, which provides in relevant part:

> (a) When it becomes necessary to reduce expenses, the forces at any point or in any department or subdivision thereof shall be reduced, seniority to govern; and employees affected to take the rate of the job to which they are assigned.
>
> (b) (1) Five working days advance notice will be given to employees affected before the abolishment of positions or reduction in force, and list of employees affected will be furnished to the local committee. . . .

Decker II, 688 F. Supp. at 110. CSX contends that these RIF procedures are applicable to job abolishments resulting from line sales, as well as other changes in CSX's operations.

The district court found that the pertinent collective bargaining agreements also provided for various labor protections and furlough benefits for terminated employees, and that in the last previous (1984) round of collective bargaining, some of the appellant unions had traded off demands for new or enhanced protective provisions for other benefits. *See Decker II*, 688 F. Supp. at 104 & n.7 (detailing labor protections and furlough benefits).

Appellants dispute the applicability of the RIF provisions, and point to the fact that they do not refer specifically to line sale situations. Appellants contend that the RIF provisions only allow management to abolish a position for which work "has disappeared." Distinguishing the situation presented by the sale of the Buffalo-Eidenau line, appellants argue that here work did not *disappear*, but rather was *transferred* by a deliberate action of the carrier. Appellants note in this regard that many of the CSX employees who worked on the Buffalo-Eidenau line had seniority rights specific to that line which would not survive a sale under which B&P did not assume any obligation to continue to administer the Agreements providing those rights.

Appellants also contend that the district court, by concluding that the controversy presented for determination was a minor dispute, "improperly abdicated its exclusive jurisdiction to determine what the status quo is which the Railway Labor Act requires to be maintained during bargaining under that statute."

Addressing the last contention first, it seems to us that appellants have the situation analytically backward. As indicated earlier, there is generally no duty to maintain

the status quo during a minor dispute, but only during a major dispute.[8] *Air Cargo, Inc. v. Local Union 851, IBT*, 733 F.2d 241 (2d Cir. 1984), for example, on which appellants place considerable reliance, ruled that "*while the major dispute procedures of section 6 are being carried out*, the district court has exclusive jurisdiction to ensure that the status quo is being maintained . . . . [and] therefore . . . to determine what the status quo is." *Id.* at 247 (emphasis added). It is accordingly necessary to address, as a threshold matter, the nature of the controversy between the parties. Once the district court ruled that the controversy was a minor dispute, the status quo issue upon which appellants rely was mooted.

The question remains, of course, whether the district court correctly ruled that a minor, rather than major, dispute was before it. As indicated earlier, the district court was only required to conclude that CSX's position was "plausible," *see Local 553*, 695 F.2d at 673, and not "obviously insubstantial," *see Southern Ry.*, 384 F.2d at 327. We conclude that CSX met this relatively light burden with respect to interpretation of the pertinent labor agreements, and that the district court properly so concluded. Any further inquiry by the district court would have been unwarranted, since "it is not for [the court] to weigh, and decide who has the better of the argument. If the court [does] this, it overstep[s] its bounds and usurp[s] the arbitrator's function." *Maine Cent. R.R.*, 787 F.2d at 782.

2. *Past Practice.*

As indicated earlier, CSX also supports its position by pointing to its past practice of selling or abandoning rail lines without engaging in RLA bargaining over those sales and abandonments. As the First Circuit stated in *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 792 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986):

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[8] *But see infra* note 10.

> In defending an operation change as not raising a major dispute, a carrier is not limited to the collective bargaining agreement to show the basis for its action. The Supreme Court has stated that the carrier can rely on "those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement." *Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 153, 90 S. Ct. 294, 301, 24 L.Ed.2d 325 (1969). The Supreme Court has made clear that for a past practice to be considered an "actual, objective working condition[]", it must have occurred "for a sufficient period of time with the knowledge and *acquiescence* of the employees to become in reality a part of the actual working conditions." *Id.* at 154, 90 S. Ct. at 301 (emphasis supplied). Accordingly, in an opinion of this court also published today, we found a minor dispute where the carrier could identify "instances of past practice *accepted by the unions* which, arguably, could support its contention." *Maine Central Railroad v. United Transportation Union*, 787 F.2d 780, 782 (1st Cir. 1986).

Id. at 799.

In the instant case, the district court found persuasive the fact that CSX had in the past accomplished ten separate sales of line segments, involving job abolishments and employee furloughs, without objection by appellants that these sales violated the Agreements or the RLA. Appellants contend, however, that there was no acquiesence on their part in these sales. Rather, their failure to initiate major dispute processes under the RLA in the past came about because other protections were available under the ICA.

It was only after a 1982 policy change, appellants contend, that the ICC began refusing to impose these employee protections in cases of rail line sales. Appellants

point out that they unsuccessfully petitioned the ICC to change its position and then challenged that position in court. In addition, the district court found that at least one union, the UTU, served a Section 6 notice in connection with one prior sale, although the notice was later withdrawn when CSX contended that the notice violated the moratorium agreement in the CSX-UTU agreement, *see supra* note 1, and in any event that the ICC had exclusive jurisdiction over the sale. *See Decker II*, 688 F. Supp. at 111. Appellants contend, in summary, that they "attempted to obtain protection for affected employees through the ICC, the courts or by bargaining in each sale where such protections were not afforded by the ICC and employees were affected."

As stated earlier, a carrier is entitled to rely upon past practices which have been accepted by the affected unions as establishing an agreement between them. *See Brotherhood of Locomotive Eng'rs*, 788 F.2d at 799 (both stating rule and determining that carrier had not established acceptance of past practices). In view of the contested issues of fact concerning appellants' acquiescence in the prior sales by CSX, we give little weight to this consideration, and even less to prior abandonments which pose distinguishable legal and factual considerations, but nonetheless agree with the district court that CSX's position with respect to past practice is "arguable," *see Decker II*, 688 F. Supp. at 112, and lends some minimal support to a "minor dispute" determination which rests primarily upon the RIF provisions of the pertinent collective bargaining agreements.

3. *Creating a major dispute by issuing Section 6 notices.*

Appellants contend that CSX was required to file a Section 6 notice with respect to the sale of the Buffalo-Eidenau line and related job abolishments, and that the Section 6 notices which appellant unions filed after April 1, 1988, *see supra* note 1, make clear that "the underly-

ing dispute in this case is clearly a major dispute, for [appellants are] seeking to acquire by bargaining rights which do not exist today." Appellants also point out that the order of the district court from which this appeal is taken contains the following provision:

> While [CSX] can proceed with the sale of the line, [CSX] is ordered to bargain with Defendant unions, consistent with the requirements of the Railway Labor Act, over notices served pursuant to Section 6 of the Railway Labor Act, 45 U.S.C. § 156, on or after April 1, 1988, in connection with the sale of the Buffalo-Eidenau line.

First, CSX was under no obligation to serve Section 6 notices if the job abolishments which it was undertaking with respect to the sale of the Buffalo-Eidenau line were authorized by its existing labor agreements. Since, as the district court concluded in *Decker II* and we conclude herein, those agreements may plausibly be interpreted to provide that authority, CSX was entitled to treat the controversy as a minor dispute, and therefore had no obligation to file Section 6 notices.

Second, assuming that a minor dispute is in fact presented, the service of Section 6 notices by the appellant unions would have no transforming or alchemizing effect upon that situation. As we stated in *Rutland*:

> In reaching for resolution of this problem of course we must not place undue emphasis on the contentions or the maneuvers of the parties. Management will assert that its position, whether right or wrong, is only an interpretation or application of the existing contract. Unions, on the other hand, in their assertions about the dispute at issue, will obviously talk in terms of change. Since a Section 6 notice is required by the statute in order to initiate a major dispute, *the labor representatives are likely to serve such a notice* in any dispute arising out of an

> ambiguous situation so as thereby to make the controversy appear more like a major dispute. Or they may seek to bring the particular conflict at issue within the bounds of an outstanding Section 6 notice that in reality does not relate to that dispute.

307 F.2d at 33 (emphasis added) (citation omitted).

Appellants' assertion that, by giving their Section 6 notices, they were "seeking to acquire bargaining rights that [did] not exist," underscores the weakness of their position on this issue. If the agreements existing between CSX and the appellant unions governed the abolishment of positions in connection with the sale of the Buffalo-Eidenau line, rights which appellants might seek to obtain by bargaining for future agreements would manifestly be irrelevant to that controversy.

Finally, in view of the foregoing, we confess to being somewhat puzzled by the district court's direction that CSX bargain with appellants with respect to Section 6 notices served by them "on or after April 1, 1988, in connection with the sale of the Buffalo-Eidenau line." In any event, since the parties have since submitted the matter to arbitration before a special adjustment board in accordance with the district court's determination that it presented a minor dispute, and an award has been entered in that arbitration, this directive is presumably moot at this juncture.

4. *Analogous cases.*

The Seventh Circuit recently addressed a fact situation almost identical to that presented here in *Chicago & N.W. Transp. Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988). That case dealt with a line sale by Chicago & North Western Transportation Company ("C&NW") where, as here, the carrier obtained expedited ICC approval. The proposed sale was to result in the abolishment of over 300 jobs, and C&NW

did not serve Section 6 notices. Upon learning of the sale, the affected unions filed Section 6 notices expressing a desire to negotiate various employment rights, including seniority protections. Subsequent strike threats were met with a motion for a temporary restraining order by C&NW, which led in turn to a cross-motion to enjoin the line sale. *Id.* at 1280.

As here, the district court determined that the dispute was minor and ordered a preliminary injunction forbidding any strike. The circuit court affirmed, concluding that collective bargaining agreements and past practices arising thereunder embraced matters of job abolishment involved in a line sale. *Id.* at 1284. While the court found C&NW's interpretations of the pertinent labor agreements to be "subject to challenge", they were "at least plausible," resulting in a determination that the controversy was a minor dispute. *Id.* at 1285.

Other cases support this analysis and result. In *Maine Cent. R.R. v. UTU*, 787 F.2d 780 (1st Cir.), *cert. denied*, 479 U.S. 848 (1986), for example, it was held that job abolishments brought about by a lease of a rail line to a customer constituted a minor dispute, and an injunction was ordered against any strike by the affected unions during the pendency of arbitration procedures. *See also ALPA v. Eastern Air Lines*, 863 F.2d 891 (D.C. Cir. 1988) (airline's net reduction of 143 flights per day causing furlough of 2222 union employees resulted in a minor dispute under pertinent agreements); *IAM v. Eastern Air Lines*, 826 F.2d 1141 (1st Cir. 1987) (airline's layoff of 68 mechanics presented a minor dispute over relocation of work); *RLEA v. Boston & Maine Corp.*, 808 F.2d 150, 159-60 (1st Cir. 1986) (carriers' permanent abolition of positions covered by collective bargaining agreements constituted minor dispute because action "arguably" within carriers' contractual rights), *cert. denied*, 108 S. Ct. 102 (1987); *IBT v. Braniff Int'l Airways*, 437 F.2d 1272 (5th Cir. 1971) (abolishment of twenty-five

jobs arguably justified by contract interpretation); *St. Louis, S.F. & T. Ry. v. Railroad Yardmasters*, 328 F.2d 749 (5th Cir.) (permissibility of abolishment posed minor dispute because dependent upon contract interpretation), *cert. denied*, 377 U.S. 980 (1964); *ALPA v. Eastern Air Lines*, 701 F. Supp. 865 (D.D.C. 1988) (shuttle sale contemplated by past agreements and consistent with past practices presented minor dispute); *International Bhd. of Fireman v. Consolidated Rail Corp.*, 560 F. Supp. 169 (S.D. Ohio 1982) (abolition of numerous railroad positions presented a minor dispute); *Independent Union of Flight Attendants v. Pan Am. World Airways*, 502 F. Supp. 1013 (D.D.C. 1980) (decision to close flight attendant bases and furlough approximately 1000 flight attendants posed a minor dispute).

The cases cited to us by appellant do not call for a different conclusion. *Burlington N. R.R. v. UTU*, 848 F.2d 856 (8th Cir. 1988), and *RLEA v. Chicago & Northwestern Transp. Co.*, 848 F.2d 102 (8th Cir. 1988) are companion cases which were addressed to the interplay between the ICA, the RLA and (in the case of *Burlington*) the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982 & Supp. IV 1986). Both cases assumed the existence of a major dispute. There was no consideration in either case of the major/minor dispute dichotomy, or of the agreements between the parties upon which such an analysis must necessarily focus.

RLEA v. Pittsburgh & L.E. R.R., 845 F.2d 420 (3d Cir.), *cert. granted*, 109 S. Ct. 489 (1988), involved a sale by a railroad of all of its rail assets, in which the Third Circuit stated: "There is no argument about whether the collective bargaining agreement itself permits or prohibits the proposed sale. If *that* were the crux of the dispute, then this case would require an interpretation of the agreement, and would thus be a minor dispute . . . ." *Id.* at 428 n.9.

Similarly, *United Indus. Workers v. Board of Trustees*, 351 F. 2d 183 (5th Cir. 1965), involved a lease of the

carrier's entire railroad operations which would have terminated the employment of all its union employees. As the Fifth Circuit succinctly analyzed the situation, "during the term of the contract, the Carrier terminated the contract by going out of business." *Id.* at 189. The Fifth Circuit has since limited this case to its facts. *See Railway Express Agency v. Brotherhood of Ry. Clerks*, 437 F.2d 388, 393 (5th Cir.), *cert. denied*, 403 U.S. 919 (1971); *see also Chicago & N.W. Transp.*, 855 F.2d at 1286 n.3 (distinguishing *Pittsburgh & L.E. R.R.* and *United Indus. Workers* on the same grounds advanced herein).

In sum, after consideration of the pertinent provisions of the RLA, the agreements between the parties, the prior practices of the parties and the relevant case law, we agree with the district court that the controversy between the parties was a minor dispute justifying the permanent injunction issued by the district court.

C. *Effect of the Arbitration Award.*

As stated earlier, in accordance with the district court's opinion and order, and while this appeal was pending, the parties submitted their dispute to arbitration pursuant to RLA § 3, 45 U.S.C. § 153 Second (1982), which resulted in a determination in favor of appellants. The concluding "Award" of that determination however, stated only that: "The questions set before the Board are disposed of as provided in the Findings and Conclusions herein." CSX has since commenced an action in the United States District Court for the Western District of New York to review the Board's determination, and appellants have moved this court that the district court's "order and permanent injunction be vacated and that this case be remanded for further consideration of appellants' counterclaim." We now address that motion.

We are met at the outset by CSX's contention that appellants' motion is not properly before this court, be-

cause it is based upon facts not in the record of this appeal. CSX claims that "the proper procedure for seeking the vacation of a judgment which is on appeal requires that the party first seek an indication of the District Court's disposition to grant the motion before seeking a remand from this Court," citing *Litton Sys. v. AT&T*, 746 F.2d 168, 171 n.4 (2d Cir. 1984), and *Ryan v. United States Lines Co.*, 303 F.2d 430, 434 (2d Cir. 1962).

We reject this contention. There is no indication in *Litton* or *Ryan* that the described procedure is mandatory in all cases, rather than an option to be utilized where appropriate in the circumstances. Here a question of law is presented on uncontested facts, and appellants contend in substance that the district court's order should be vacated as moot because of the subsequent event of the arbitral award. It is perfectly appropriate for us to consider such an application in the first instance. *See Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1166 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); 13A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3353.10, at 440-41 (2d ed. 1984).

We consider next appellants' application that we vacate the order of the district court and the permanent injunction which that order includes. Appellants contend that the Board's determination "vitiates the underlying basis for the district court's order and injunction in this case." We disagree, believing that this contention rests upon a fundamental misconception of the RLA process for the resolution of major and minor disputes.

To begin with, the district court determined only that CSX had an "arguable" or "plausible" position based upon the extant agreements between the parties, and that a minor dispute was thereby presented which should be arbitrated by an adjustment board pursuant to RLA § 3, 45 U.S.C. § 153 (1982). This was the proper course, since "[t]he resolution of minor disputes is within the exclusive jurisdiction of . . . boards of adjustment . . .,"

IAM v. Eastern Air Lines, 847 F.2d 1014, 1017 (2d Cir. 1988) (citing *Local 553*, 695 F.2d at 673-75); *see Chicago & N.W. Transp.*, 855 F.2d at 1286, and "courts may not adjudicate the merits of these issues." *Local 553*, 695 F.2d at 675.

The Board which conducted the arbitration therefter determined that CSX's position, although "arguable" and "plausible," was, on careful analysis, unavailing. CSX has appealed that determination pursuant to RLA § 3 First (q), 45 U.S.C. § 153 First (q) (1982), but can prevail only by establishing "failure of the [Board] to comply with the requirements of this chapter, . . . failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or . . . fraud or corruption by a member of the [Board]." *Id.*

There is thus no conflict between the determinations of the district court and the Board, and the Board's decision in no way "vitiates the underlying basis" of the district court's order. On the contrary, absent a determination by the district court that the controversy between the parties was a minor dispute, there would have been no basis for Board jurisdiction over that dispute. Nor is there any conflict between the district court's conclusion that CSX's position was "plausible," and the Board's conclusion that CSX should nonetheless not prevail.[9]

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[9] As stated earlier, the Board determined that there was "no written language support" in the Agreements, and no support in past practice, for CSX's position that it could sell the Buffalo-Eidenau line without bargaining over the effect of the sale on employees. Had the district court reached this conclusion at the outset, it would presumably have treated the controversy as a major dispute, and CSX would have been required to maintain the status quo as to the affected employees, whether or not any transfer of the Buffalo-Eidenau line occurred, pending resolution of that major dispute by the prescribed RLA procedures.

The district court properly addressed only the question, however, whether CSX had a *plausible argument* that the RIF provisions of

Furthermore, the obvious implication of appellants' application to vacate the district court's anti-strike injunction is that, having prevailed before the Board, appellants are now entitled to strike. This contention counters both the general purposes of the RLA to "avoid any interruption to commerce or to the operation of any carrier engaged therein" and "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions," RLA § 1a, 45 U.S.C. 151a (1982); the corresponding duty imposed upon carriers and employees by RLA § 2 First, 45 U.S.C. § 152 First (1982), *see Chicago & N.W. Ry. v. UTU*, 402 U.S. 570, 577 (1971); and the specific provisions of RLA § 3 First (p) and (q), 45 U.S.C. § 153 First (p) and (q) (1982), providing for judicial enforcement or review of arbitration awards rendered by RLA adjustment boards.

As indicated earlier herein, the RLA dispute resolution process is structured to allow strikes at the end of the lengthy process provided for the resolution of major disputes, but to subject minor disputes to binding arbitration and forbid strikes with respect to them. As we stated in *Local 553*, "[a]s a result of the 1934 amendments [making arbitration of minor disputes compulsory], the RLA for the first time offered a means of resolving technical disputes between labor and management *without the risk of strike or work stoppages* or prolonged litigation." 695 F.2d at 675 (emphasis added). Appellants cite no authority for the startling proposition that, having prevailed in the arbitration of what the district court correctly deemed a minor dispute, they are entitled to strike. For the foregoing reasons, we conclude that they are not so entitled.

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the Agreements authorized a sale without bargaining. Its correct affirmative response to that question set in motion the RLA's minor dispute processes, and the controversy between the parties must be resolved in accordance with those processes.

Rather, as we indicated earlier and as the Seventh Circuit made clear in *Chicago & N.W. Transp.*:

> Strikes over minor disputes violate the RLA and may be enjoined by the federal courts in order to effectuate the RLA's purpose to provide for the compulsory arbitration of such matters by the NRAB.
>
> Thus, it is clear that the federal courts may issue injunctions against strikes in minor disputes in order to protect the NRAB's exclusive jurisdiction over such matters. Because injunctions barring strikes in minor disputes are necessary to ensure the proper functioning of the § 3 RLA procedures, they are not proscribed by the *Norris-LaGuardia Act.*

855 F.2d at 1287 (citations omitted).

Similarly, we see no basis for a remand to the district court for consideration of appellants' counterclaim. That counterclaim seeks a declaration that CSX "may not change the rates of pay, rules and working conditions of employees on [the Buffalo-Eidenau line] until the [RLA] *major dispute resolution processes* have been exhausted" (emphasis added), and corresponding injunctive relief.[10] The district court concluded, however, as we have, that

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[10] So far as we are aware, there was never any application to the district court for an injunction to preserve the status quo pending the resolution of the arbitration before the adjustment board. Some cases have declared that courts are not empowered to issue such "minor dispute" injunctions. *See, e.g., National Bhd. of Locomotive Eng'rs v. Consolidated Rail Corp.*, 844 F.2d 1218, 1224 (6th Cir. 1988); *IAM v. Eastern Air Lines*, 826 F.2d 1141, 1151 (1st Cir. 1987) (collecting cases). This circuit, however, has stated that such an injunction "is appropriate . . . in those instances when it appears that its absence would prevent the Adjustment Board from giving a significant remedy to the side that prevails before the Board." *Local 553*, 695 F.2d at 675 (citing *Brotherhood of Locomotive Eng'rs v. Missouri-Kan.-Tex. R.R.*, 363 U.S. 528, 534 (1960), and *Westchester Lodge 2186 v. Ry. Express Agency*, 329 F.2d 748, 752-53 (2d Cir. 1964)). We do not address this issue, which would in any event be moot at this juncture.

this controversy is a minor dispute. The Board's arbitral determination does nothing to alter that conclusion, and indeed is in no way directed to that question. *See supra* note 9; *see also General Comm. of Adjustment v. CSX R.R. Corp.*, Civ. No. 87-1712, slip op. at 9 (M.D. Pa. Feb. 24, 1989) ("[o]nly the courts have jurisdiction to rule on the issue of whether a dispute is minor or major"). There is accordingly no basis for a remand to consider appellants' counterclaim.

Finally, we address the primary concern which appears to motivate appellants' motion to vacate and remand. Both here and in a petition for rehearing of the denial of certiorari in *RLEA v. Chicago & N.W. Transp. Co.*, No. 88-464, *petition denied*, 109 S. Ct. (1989), appellants have contended that the arbitral decision by the Board in appellants' favor here leaves appellants "without any remedy," because "no employee-contractual right has been violated" and "the adjustment board has no jurisdiction to enforce the [RLA]," so that "the board [is] powerless to rectify the actual injury suffered by the employees."

As stated earlier, the Board's determination concluded with an "Award" which merely stated that the questions posed to the Board were "disposed of as provided in the Findings and Conclusions herein." Appellants' remedy for any perceived inadequacy in the Board's determination, however, is provided by RLA § 3 First (q), 45 U.S.C. § 153 First (q) (1982), which establishes a judicial remedy for "any employee or group of employees . . . aggrieved by the failure of any [adjustment board] to include certain terms in [its] award." *Id.* The reviewing court "shall have jurisdiction to affirm the order . . . or to set aside, in whole or in part, or it may remand the proceeding . . . for such further action as it may direct." *Id.* We note in this connection the statement in *Chicago & N.W. Transp.*, in declining to enjoin the line sale there under consideration, that:

> If the NRAB rejects [the carrier's] interpretation of the collective bargaining agreements and determines that the employees who are displaced by the challenged rail line sale are entitled to relief, it will be able to order the necessary payment of monies and adjustments in seniority levels it deems necessary to make these employees whole. Thus, it cannot be inferred that the legal remedy available to the RLEA unions in this case (via the NRAB arbitration procedure) is inadequate.

855 F.2d at 1288.

By noting the possible applicability of this statement to the situation resulting from the Board's arbitral decision in favor of appellants here, of course, we are not to be understood as prejudging, or providing a rule of decision for, any of the issues that may arise in the currently pending, or any subsequent, litigation concerning that decision.

Conclusion

The order of the district court is affirmed. The post-argument motion to vacate and remand is denied.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-87-1147C

THOMAS A. DECKER, As Local Chairman for the U.T.U.; U.T.U., Local 377; and ROBERT W. EARLEY, General Chairman, U.T.U. General Committee of Adjustment C & T, B & O System,

Plaintiffs,

vs

CSX TRANSPORTATION, INC.,

Defendant.

CIV-87-1391C

CSX TRANSPORTATION, INC.

Plaintiff,

vs

UNITED TRANSPORTATION UNION ("UTU"); F.A. HARDIN, President (UTU); J. A. CIANCIOTTI, General Chairman, (UTU(E)); ROBERT EARLEY, General Chairman, B&O General Committee of Adjustment (UTU (C&T)); UNITED TRANSPORTATION UNION YARDMASTERS DEPARTMENT ("RYA"); B.R. CARVER, President (RYA); RICHARD P. DEGENOVA, General Chairman ((RYA); AMERICAN TRAIN DISPATCHERS ASSOCIATION ("ADTA"); R.J. IRVIN, President (ATDA); D.W. BRANHAM, General Chairman (ATDA); BROTHERHOOD OF LOCOMOTIVE ENGINEERS ("BLE"); L.D. MCFATHER, President (BLE); J.A. LECLAIR, General Chairman ("BLE); BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES ("BMWE"; G.N. ZEH, President (BMWE); B.J. TWIGG, General Chairman (BMWE); TRANSPOR-

TATION COMMUNICATIONS UNION ("TCU"); R.D. KILROY, International President (TCU); R.F. MALCOLM, General Chairman, C&O System Board of Adjustment, Brotherhood of Railway, Airline and Steamship Clerks ("BRAC"); L.H. TACKETT, General Chairman, B&O System Board of Adjustment No. 6, BRAC; TRANSPORTATION COMMUNICATIONS UNION, Carmen Division ("CARMEN"); C.E. WHEELER, President, (CARMEN); M.L. CRAWFORD, General Chairman (CARMEN); and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ("IAM"),

Defendants.

APPEARANCES:

AKIN, GUMP, STRAUSS, HAUER & FELD (RONALD M. JOHNSON, ESQ., of Counsel), Washington, D.C.

-and-

MOOT & SPRAGUE (COURTLAND LAVALLEE, ESQ., of Counsel), Buffalo, New York, for Plaintiffs.

HIGHSAW & MAHONEY, P.C. (JOHN O'BRIEN CLARKE, JR., ESQ., of Counsel), Washington, D.C.

—and—

COLLINS, COLLINS & DINARDO (JOHN F. COLLINS, ESQ., of Counsel), Buffalo, New York, for Defendants.

This case presents an important question, still unsettled by prior precedent, as to the interaction of two federal statutes: the Railway Labor Act, 45 U.S.C. §§ 151-188 [RLA], and the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 [ICA]. The issue arises in the context of the pending sale by CSX Transportation, Inc. [CSXT], plaintiff in this action for injunctive and declaratory relief, of a line of railroad between Buffalo, New York, and Eidenau, Pennsylvania, to the Buffalo and Pittsburgh Railroad, Inc. [B&P], a newly formed corporation. Spe-

cifically, the question presented is whether a railroad has a duty to refrain from completing a sale of one of its rail lines pending bargaining under the RLA over the effects of that sale on the employees of that line when the Interstate Commerce Commission [ICC] has granted expedited approval to the proposed sale without imposition of labor protective conditions. In order to properly resolve this question, it will be helpful to the court to review the relevant statutory background, the factual and procedural background of the instant case, and the status of the relevant case law before addressing the specific areas of dispute between the parties.

Statutory Background

The RLA was enacted in 1926 to regulate labor relations on the nation's railroads by establishing an "elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation." *Detroit and Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 148-49 (1969). Central to the RLA's purposes is the duty imposed on rail labor and carriers by § 2 First,

> to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152 First; *see Chicago & N.W. Transp. Co. v. United Transp. Union*, 402 U.S. 570, 574-75 (1971). The disputes to which § 2 First refers fall into two categories—"major" disputes, which involve efforts to formulate new collective bargaining agreements or proposals to change existing agreements, and "minor" disputes, which

involve the interpretation or application of a specific provision of an existing collective bargaining agreement.[1]

Minor disputes are resolved through a formal grievance process that culminates in binding arbitration performed by the National Railroad Adjustment Board, as set forth in § 3, 45 U.S.C. § 153. When a minor dispute arises, the parties are not precluded from changing the status quo while arbitration is pending. *See, e.g., United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 545 (3d Cir. 1974). However, strikes over minor disputes are prohibited, and may be enjoined by the district court to preserve the jurisdiction of the Adjustment Board. *Brotherhood of Railway Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, *reh'g denied*, 353 U.S. 948 (1957). Major disputes, on the other hand, invoke a status quo obligation until the RLA bargaining processes have been exhausted. 45 U.S.C. §§ 152, 156; *see Detroit & Toledo Shore Line*, 396 U.S. at 150-53.

Courts have the power to grant injunctive relief when a party violates the RLA procedures by unilaterally altering the status quo. *Detroit v. Toledo Shore Line*, 396 U.S. at 150. Once the RLA processes are finally exhausted and it becomes clear that the parties will not reach an agreement, the status quo obligations are removed and the parties are free to resort to self-help. *Jacksonville Terminal*, 394 U.S. at 378-80.

The ICA was enacted in 1887 and has been substantively amended several times since.[2] It vests in the ICC

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[1] It should be noted that the RLA does not use the term "major" or "minor" to distinguish disputes. Rather, these terms have been judicially created by cases interpreting that Act. *See Elgin, J. & E Ry. v. Burley*, 325 U.S. 711, 722-28 (1945); *Local 553, Transport Workers Union v. Penn Central Transp. Co.*, 695 F.2d 668, 673 (2d Cir. 1982).

[2] The most important amendments for the purposes of the issues presented in the instant case are the Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920); the Transportation Act of 1940, ch. 772, 54 Stat. 898 (1940); the Railroad Revitalization and Regulatory

exclusive jurisdiction to approve and regulate acquisitions of rail lines. *See, e.g.*, 49 U.S.C. §§ 10901(a), 11343(a); *see also Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-20 (1981). Section 10901 governs the acquisition of rail lines by newly formed carriers and sets up a procedure whereby the new carrier may obtain prior approval of the transaction only upon a finding by the ICC "that the present or future public convenience and necessity require or permit" the transaction to proceed. 49 U.S.C. § 10901(a). The ICC has discretion to condition its approval on the provision of "a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected [by the transaction.]." § 10901(e). *Compare with* 49 U.S.C. § 11347 (regulating consolidations, mergers, or acquisitions involving existing rail carriers) ("Commission *shall* require" labor protective conditions) (emphasis added). Pursuant to § 10505, the ICC may exempt any § 10901 transaction from the prior approval requirements when it finds that such regulation "is not necessary to carry out" national rail transportation policy and is "not needed to protect shippers from the abuse of market power." 49 U.S.C. § 10505(a).

As a means of facilitating entry into the railroad business, the ICC, in a 1985 rule-making proceeding, decided to exempt from regulation under § 10901 the entire class of transactions involving acquisitions by non-carriers. *See Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) [hereinafter *Ex Parte 392*], *review denied mem. sub. nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987). Under *Ex Parte 392*, an exemption becomes effective, and

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Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). *See generally* H.R. Conf. Rep. No. 96-1430, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110.

a transaction deemed approved, seven days after the acquiring entity files notice of exemption with the ICC, 49 C.F.R. § 1150.32(b); 1 I.C.C.2d at 820, unless a petition to revoke the exemption has been filed or the transaction is stayed by the Commission. *See* 49 U.S.C. § 10505(d); 49 C.F.R. § 1150.34; 1 I.C.C.2d at 815.

Factual and Procedural Background

The following facts are not disputed. CSXT is a Class 1 railroad subject to the jurisdiction of the ICC under the ICA, and is also a "carrier" within the meaning of the RLA. CSXT operates rail lines in 20 states and in the province of Ontario, Canada. As part of its system, CSXT owns and operates a 369-mile line of railroad between Buffalo, New York, and Eidenau, Pennsylvania. This line was formerly part of the Baltimore and Ohio Railroad [B&O] which, along with the Chesapeake and Ohio Railroad [C&O], was ultimately merged into CSXT as of 1987. CSXT presently administers all collective bargaining agreements between the former B&O and the unions representing employees on the Buffalo-Eidenau line. Item 31, pp.1-2; Item 33, p.2. (Item numbers refer to file No. CIV-87-1391C unless otherwise noted.)

Defendants are labor organizations and certain named officers of those organizations which represent various crafts or classes of CSXT employees, including those employees currently working on the Buffalo-Eidenau line. Defendants are representatives within the meaning of the RLA, 45 U.S.C. § 151, Sixth, and are all parties to collective bargaining agreements with CSXT. Item 33, p.3.

CSXT asserts, and defendants do not dispute, that traffic on the Buffalo-Eidenau line has diminished to the point of marginality, and thus, in 1986, CSXT began looking for a buyer for that line.[3] Upon learning of the

[3] According to the testimony of John Gibson, Senior Manager of Short Line Marketing, CSXT, a "marginal" line is defined as one

carrier's intention to sell, a number of defendant unions served notices on CSXT under § 6 of the RLA seeking to preserve the status quo until negotiations could be conducted regarding the effects of the proposed sale on railroad employees. CSXT responded that these notices violated the moratorium provisions of the respective collective bargaining agreements [4] and that, at any rate, the sale of the line was subject to the ICC's exclusive jurisdiction, and thus, the status quo requirements of the RLA were inapplicable. *Id.*; Item 31, pp.2-3. Defendants have threatened to strike the entire former B&O system if the sale goes through. *See* Item 17, p.19.

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that is not currently earning the corporate rate of return, or is experiencing a traffic loss which, if uncorrected, would lead to eventual abandonment. Item 44, p.58. The corporate rate of return fluctuates according to market trends (*id.*), and at the time the letter of intent was entered into with B&P, the rate was 11.5 percent (*id.*, p.59; Item 41, p.3), while the rate of return on the Buffalo-Eidenau line was 1.4 percent (Item 41, p.3). According to the unions, if a rail line's avoidable costs are greater than its revenues, *i.e.*, the line is unprofitable, the carrier will seek to abandon the line; if the rate of return is positive, but less than the desired corporate rate, the line cannot be abandoned since the railroad cannot obtain the necessary authority from the ICC. *See* Item 41, p.3.

[4] A typical moratorium provision reads as follows:

> *Section 2—Effect of this agreement*
>
> (a) The purpose of this Agreement is to fix the general level of compensation during the period of the Agreement, and to settle the disputes growing out of the notices served upon the carriers listed in Exhibit A by the organization signatory hereto dated on or about April 2, 1984, covering wages and rules, health and welfare and supplemental sickness benefits and proposals served on or about April 9, 1984, by the carriers for concurrent handling therewith. . . .
>
> (b) [N]o party to the Agreement shall serve, prior to April 1, 1988 (not to become effective before July 1, 1988), any notice or proposal for the purpose of changing the subject matter of the provisions of this Agreement . . . .

See Exh. F(5) attached to Item 16.

In August, 1987, defendants Robert Earley, General Chairman of defendant United Transportation Union [UTU], and Thomas Decker, Local Chairman of UTU Local 377, filed suit in New York State Supreme Court seeking to enjoin CSXT from altering the status quo as it existed on the Buffalo-Eidenau line as of the date the first § 6 notices were filed. The case was subsequently removed to this court and docketed as CIV-87-1147C. Meanwhile, on September 16, 1987, CSXT entered into a letter of intent with B&P to sell the line, and on September 22, 1987, B&P filed a verified notice of exemption with the ICC under 49 C.F.R. § 1150.31 and *Ex Parte 392* for exemption from the prior approval requirements of 49 U.S.C. § 10901. That exemption became effective seven days later on September 29, 1987, and by order dated October 13, 1987, and served October 19, 1987, the ICC denied the UTU's request for a stay of the exemption's effectiveness. *Buffalo & Pittsburgh Railroad, Inc.—Exemption—Acquisition and Operation of Lines in New York and Pennsylvania*, Finance Docket No. 31116 (October 13, 1987); *see* Exh. 2 attached to Item 17. Also on September 22, 1987, B&P's corporate parents jointly filed a petition under § 10505 for exemption from the common control approval requirements of § 11343. By order dated December 21, 1987, and served December 28, 1987, the ICC granted the exemption, thereby authorizing B&P's parent corporations to control the B&P. *Genesee and Wyoming Industries, Inc., The Arthur T. Walker Estate Corp., Dumaines and Buffalo & Pittsburgh Railroad, Inc. Exemption—Continuance in Control*, Finance Docket No. 31117 (December 31, 1987); *see* Exh. 3 attached to Item 17.

By order dated November 3, 1987, this court found that, based on the Second Circuit's decision in *Railway Labor Executives' Ass'n v. Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 927 (1987), the issuance of a status quo injunc-

tion as requested by the unions would impermissibly interfere with the ICC's order of exemption, and thus, the unions' complaint was dismissed for failure to state a claim upon which relief could be granted. *Decker v. CSX Transportation, Inc.*, 672 F. Supp. 674 (W.D.N.Y. 1987).

On October 29, 1987, a few days before the dismissal of the unions' claim CSXT initiated a separate action in this court against 12 labor unions and 27 union officials [5] seeking a judgment declaring that CSXT is under

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[5] Named as defendants are:

United Transportation Union [UTU], F.A. Hardin (President, UTU), J.A. Cianciotti (General Chairman, UTU(E)), and R.W. Earley (General Chairman, B&O General Committee of Adjustment, UTU (C&T));

UTU, Yardmasters Department [RYA], B.R. Carver (Assistant to President, RYA), and Richard P. DeGenova (General Chairman, UTU(RYA));

American Train Dispatchers Association [ATDA], R.J. Irvin (President, ATDA), and D.W. Branham (General Chairman, ATDA);

Brotherhood of Maintenance of Way Employees [BMWE], G.N. Zeh (President, BMWE), and B.J. Twigg (Executive Board, BMWE);

Transportation Communications Union [TCU] (formerly Brotherhood of Railway, Airline and Steamship Clerks [BRAC]), R.I. Kilroy (International President, TCU), R.F. Malcolm (General Chairman, C&O System Board, BRAC), and L.H. Tackett (General Chairman, B&O System Board, BRAC).

Brotherhood of Locomotive Engineers [BLE], L.D. McFather (President, BLE), and J.A. LeClair (General Chairman, B&O Carmen);

TCU, Carmen Division [Carmen], C.E. Wheeler (President, Carmen), and M.L. Crawford (General Chairman, B&O Carmen);

International Association of Machinists and Aerospace Workers [IAM], J.F. Peterpaul (Vice President, IAM), A.J. Sarcone (General Chairman, IAM District 22), and W.D. Snell (Assistant President/Directing General Chairman, IAM District 22);

no statutory obligation to negotiate with employees or their union representatives regarding the proposed sale of the Buffalo-Eidenau line and enjoining the unions from engaging in any strike activity in an effort to impede the sale. *See* Item 1. This action was docketed as CIV-87-1391C.

Prior to filing an answer to CSXT's complaint, the unions moved pursuant to Fed.R.Civ.P. 59(a)(2) to vacate this Court's November 3, 1987, order in light of subsequent developments in the relevant case law, and moved pursuant to Fed.R.Civ.P. 42(a) to consolidate the two actions. The unions then answered CSXT's complaint (Item 7), asserting as affirmative defenses lack of subject matter jurisdiction over CSXT's request for an injunction against a strike, lack of standing for such an injunction, and failure to state a claim upon which relief may be granted. Item 7, p.1. The unions also affirmatively asserted counterclaims for judgment against CSXT declaring that the status quo be maintained until the RLA dispute resolution processes have been fully exhausted, and enjoining CSXT from consummating the sale of the Buffalo-Eidenau line (or any of its rail lines) until the carrier has fully complied with the RLA. Item 7, p.14.

International Brotherhood of Firemen and Oilers [IBF&O], J.L. Walker (International President, IBF&O), and D.S. Anderson (General Chairman, System Council No. 6, IBF&O);

Sheetmetal Workers International Association [SMWIA], A.R. Hicks (General Chairman, SMWIA), and D.C. Buchanan (Dir. Railroad Workers, SMWIA);

International Brotherhood of Electrical Workers [IBEW]; E.P. McEntee (International Vice President, IBEW), and George L. Laitile (General Chairman, IEBW, and

Brotherhood of Railroad Signalmen [BRS], V.M. Speakman, Jr. (President, IBEW), and C.T. Green (General Chairman, B&O System Committee, BRS).

See Item 1, p.1.

The unions then moved to dismiss the complaint, insofar as it requests an injunction against a strike, on the ground that § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 [NLGA], deprives the district court of jurisdiction to enjoin strike activity. Item 10. CSXT opposes, contending that the unions' threatened strike would be enjoinable as a violation of both the ICA and the RLA. Item 15.

Finally, the unions filed a motion pursuant to Fed.R. Civ.P. 65(a) for a preliminary injunction requesting that the court enjoin CSXT from altering the rates of pay, rules, and working conditions of its employees on the Buffalo-Eidenau line during the pendency of this action. Item 32.

On March 26, 1988, CSXT posted notices stating that the sale of the Buffalo-Eidenau line would be consummated at 12:01 a.m. on April 6, 1988, and that, effective 11:59 p.m. on April 5, 1988, certain jobs would be abolished. *See* Exh. A attached to Item 31. Under its sales agreement with CSXT, B&P has pledged to offer employment to at least 160 of the 226 employees currently working on that line, and as of April 13, 1988, had made job offers to 184 CSXT employees.[6]

The sales agreement does not require B&P to assume the administration of the collective bargaining agreements currently in effect between CSXT and the defendant unions. B&P will be an independent carrier that will set its own freight rates, rates of pay, rules, and working conditions which will generally be different from

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[6] This figure (184) includes several CSXT employees on furlough status or working elsewhere in the CSXT system. As of the time of the hearing, according to the testimony of John Bell (Vice President and General Manager, B&P), 113 former CSXT employees (or exactly one-half the number of CSXT employees on the Buffalo-Eidenau line) had accepted B&P's offers. Item 44, p.147; Item 44, p.14.

the employment terms between the unions and CSXT. Item 44, pp.85-87, 169; Item 42, pp.7-11.

On April 5, 1988, after hearing oral argument of the parties' positions, this court ordered an evidentiary hearing on the injunction motions and cross motions and also ordered that the status quo on the Buffalo-Eidenau line be maintained until such time as that hearing was concluded and a decision on those motions was rendered. Item 40, pp.109-12. The hearing was held between April 13-19, 1988, and both parties presented witnesses and exhibits to support their positions as to the various issues still in dispute.

The evidence presented at the hearing revealed several items of importance to these findings. For example, under existing collective bargaining agreements, many of the employees affected by the sale will be eligible for labor protections and furlough benefits. Item 41, p.9. Union representation of rail labor is essentially categorized by craft—the Brotherhood of Locomotive Engineers [BLE], which represents engineers; the United Transportation Union (E) [UTU(E)], which represents firemen and hostlers; and the UTU(C&T), which represents train service employees, are "operating craft" unions, while the rest of the unions named as defendants (*see* note 5, *supra*) are "non-operating craft" unions (or "non-ops"). Approximately 80 percent of the non-operating craft employees working on the Buffalo-Eidenau line, or about 80-85 employees, will be eligible for some form of labor protection as a result of the sale.[7] Item 46, pp.93-94. All

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[7] For example, BMWE and BRS (the abbreviations used herein refer to the defendant unions, whose titles are set forth in full in note 5, *supra*) are party to the stabilization agreement of February 7, 1965, which protects employees in service on October 1, 1964, and guarantees 100 percent of their rate of pay of the job held at that time for the entirety of their working lives. Item 46, p.29. Seventeen of 38 employees represented by BMWE whose jobs will be abolished by the sale are eligible for protections under that agreement (*id.*, p.30), and three of seven BRS-represented employ-

employees furloughed as a result of the sale are entitled to furlough benefits, including four months of medical insurance and one year of railroad unemployment insurance. Item 45, p.22.

It was also established at the hearing that, while the work which CSXT employees are currently performing on the Buffalo-Eidenau line will remain in existence when the line is sold, current employees who enjoy contractual seniority rights to that work will not be able to exercise those rights once the line is sold, and the work transferred to the B&P. Item 42, p.11; Item 47, pp.12, 120-21.

Finally, it was established that, as mentioned above, some of the defendant unions are already party to protective agreements (such as the February 7, 1965 agreement). In the last round of national bargaining in 1984, several of the unions sought new protections or to expand existing ones, but agreed instead to adopt other economic gains. Item 45, p. 37; Item 46, pp. 42-46; Item 47, pp. 54, 146.

On May 10, 1988, prior to summations, the preliminary injunction applications were advanced to judgment for permanent injunction in accordance with Fed.R.Civ.P. 65(a)(2), as agreed to by the parties and as approved by the court.

Current Status of the Relevant Case Law

In its November 3, 1987 order (672 F. Supp. 674), this court relied on the *Staten Island* case, 792 F.2d 7, as the Second Circuit's most recent and most explicit

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ees whose jobs will be abolished are eligible for such protections. *Id.*, p.35. All TCU(B&O) employees are eligible for five-year protection at 100 percent of their daily rate (*id.*, p.31), and TCU(C&O) employees are eligible for lifetime protections. *Id.* Carmen, IAM, IBEW (Communications), SMWIA, and IBFO-represented employees are eligible for protection under the September 25, 1964, agreement, which provides 60 percent furlough allowance for five years, based on a test period average. *Id.*, pp.33-34; *see* Item 41, pp.9-10.

ruling on the issue of whether the ICC's authority over a railroad's sale of a marginal line preempts the application of the RLA. The transaction in *Staten Island* involved an abandonment/sale in which the railroad initially abandoned the line at issue, and mandatory labor protective conditions were imposed by the ICC under § 10903 (b) (2).[8] Subsequently, a buyer for the line was located, and the ICC authorized the sale under § 10905(e), which required dismissal of the application for abandonment and did not provide for labor protections.[9] The sale went

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[8] Section 10903(b)(2) provides that, once the application for abandonment is approved:

> the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title . . . .

49 U.S.C. § 1090[sic](b)(2).

Section 11347 provides that:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

49 U.S.C. § 11347.

[9] Section 10905(e) provides:

> If the carrier and a person offering to purchase a line entered into an agreement which will provide continued rail service,

through on the same day the ICC issued its authorization, and the labor unions filed suit in district court on the next day, claiming that the sale violated the status quo provisions of RLA § 6, and sought an injunction requiring the railroad to bargain with labor over the effects of the sale. The district court dismissed the complaint for lack of subject matter jurisdiction, Fed.R.Civ.P. 12(b)(1), reasoning that since exclusive jurisdiction over review of an ICC order rests with the federal courts of appeals under 28 U.S.C. §§ 2321 and 2342, the unions' claims constituted an impermissible collateral attack on the ICC's approval of the abandonment/sale, and must be dismissed. The Second Circuit affirmed, but modified the district court's dismissal of the unions' claims on the basis that the disagreement at issue was a "major" dispute within the ambit of § 6 procedures, and thus, the district court had jurisdiction over the claims. The dismissal was upheld, however, since the appeals court agreed with the district court's conclusion that no meaningful remedy could be fashioned that would not impinge upon the ICC's order approving the sale, and therefore, the claim should have been dismissed for failure to state a claim upon which relief may be granted, Fed.R.Civ.P. 12(b)(6). 792 F.2d at 11-12.

In adapting this reasoning to sales of rail lines to newly formed carriers under § 10901 and exempted from prior approval requirements under § 10505 and *Ex Parte 392*, every court deciding the issue (with one notable exception) has refused to order a status quo injunction under the RLA on the ground that such relief would impermissibly interfere with the ICC's authorization of the respective sale. *See, e.g., Railway Labor Executives' Ass'n v. Chicago & N.W. Transp. Co.*, 124 L.R.R.M. 2715 (D. Minn. 1986), *appeal pending*, No. 87-5071-MN (8th

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the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. . . .

49 U.S.C. § 10905(e).

Cir.); *Railway Labor Executives' Ass'n v. City of Galveston*, No. G-87-359 (S.D. Tex. Nov. 4, 1987); *UTU v. Burlington Northern R.R. Co.*, 672 F. Supp. 1579 (D. Mont. October 29, 1987); *Burlington Northern R.R. Co. v. UTU*, No. 86-5013-CV-SW-0 (W.D. Mo. Aug. 29, 1986), *appeal pending*, No. 86-2600-WM (8th Cir. argued Dec. 15, 1987); *Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, No. 88-C-444 (N.D. Ill., E.D. March 16, 1988), *appeal pending*, No. 88-1504 (7th Cir. argued April 21, 1988).

The notable exception to this line of reasoning is the Third Circuit's holding in *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie Railroad Co.*, No. 88-3797 (3d Cir. April 8, 1988) [*P&LE IV*], affirming the district court's decision in *RLEA v. P&LE*, No. 87-1745 (W.D. Pa. November 30, 1987) [*P&LE III*]. Because of the importance of that holding and its direct relevance to the issues presently before this court, a history of the *P&LE* decisions is in order.

The *P&LE* cases involved a sale to a newly formed carrier pursuant to § 10901. Upon notification that the sale was pending, the unions requested that the railroad bargain over the effects of the sale on its employees, and noted that the railroad had failed to send notice to the unions under § 6 of the RLA. The railroad refused to bargain, asserting that the transaction was controlled exclusively by the ICC and that § 6 bargaining would usurp the ICC's authority. The unions then commenced both a suit in federal court to enforce the employees' rights under the RLA and a strike against the railroad. The district court, upon the railroad's counterclaim, entered an order enjoining the strike on the ground that the jurisdiction of the ICC under the ICA in the regulation of such transactions displaced the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 108 [NLGA]. *RLEA v. P&LE*, No. 87-1745, *slip op.* at 7 (W.D. Pa. October 8, 1987) [*P&LE I*].

The Third Circuit reversed in *RLEA v. P&LE*, 831 F.2d 1231 (3d Cir. 1987) [*P&LE II*], finding that the mandate of the NLGA divested the district courts of the power to enjoin employees from exercising their right to strike. In reaching her decision, Judge Sloviter undertook a reasoned analysis of the relationship between the NLGA, the RLA, and the ICA, and concluded that the regulatory policies of the ICA do not require the courts to treat that statute as labor legislation. Thus, according to *P&LE II*, the ICC's authority to approve acquisitions of railroad property does not supersede the strong national policy to resolve labor disputes as embodied in such laws as the NLGA and the RLA. 831 F.2d at 1235-36.

In reaching the merits of the unions' request for injunctive relief, the district court in *RLEA v. P&LE*, No. 87-1745 (W.D. Pa. November 30, 1987) [*P&LE III*], carried Judge Sloviter's reasoning a step further by holding that the authority granted to the ICC by § 10505 of the ICA is limited to exemption from the requirements of that act alone.

> The ICC has no express authority pursuant to § 10505 to exempt a transaction such as the instant one from the requirements of any other federal statute, e.g., the RLA. Thus, in effect, when the ICC exempts a transaction pursuant to § 10505, as is the case in *Ex Parte 392* proceedings, the ICC is doing nothing more than relieving the carrier of its obligation to comply with otherwise applicable requirements of the ICA.

P&LE III, No. 87-1745, *slip op.* at 8 (November 30, 1987). Thus, the fact that Congress delegated broad authority to the ICC to regulate the transportation industry did not require the court to imply that Congress at the same time intended to annul or implicitly overrule the RLA. *Id.* at 11. The court distinguished the *Staten Island* case on the ground that 1) the ICC had mandated

completion of the sale in *Staten Island*, whereas the *P&LE* sale was merely permissive, and 2) the sale in *Staten Island* had already taken place by the time the unions filed for injunctive relief, and thus the status quo had already been altered, whereas the sale in *P&LE* had not yet occurred, and thus the court could preserve the status quo by way of injunction. Accordingly, the court enjoined the railroad from altering the rates of pay, rules, and working conditions in existence at the time the unions served their § 6 notices until the dispute resolution provisions of the RLA were complied with.

In its affirmance, the Third Circuit significantly expanded upon the district court's analysis, *RLEA v. P&LE*, No. 87-3797 (3d Cir. April 8, 1988) [*P&LE IV*]. The Court of Appeals had little difficulty in finding that the carrier's decision to sell its assets and the consequential elimination of a substantial number of jobs presented a "major" dispute which triggered the RLA bargaining process. *Id.* at 5, 18-20. The court had much more difficulty over the question of the preemptive effect of the ICA. While recognizing the ICC's exclusive authority over the approval and regulation of acquisitions of rail lines, *id.* at 31-39, the court found an equally strong policy in the RLA to avoid disruption of rail traffic which, coupled with the absence of language in the ICA that would expressly prohibit the issuance of a status quo injunction, persuaded the court to refuse to relieve the carrier of its RLA bargaining duties. *Id.* at 39-40.

Also persuasive to the Third Circuit was the fact that, of the 15 distinct policies enumerated in § 10101a upon which the ICC must focus in its regulation of the railroad industry, only one such policy directs the ICC's attention to the interests of labor. *See* 49 U.S.C. § 10101a(12). From this, the court refused to infer that Congress intended that rail labor look to the ICC as its sole source of protection when a pending sale threatened to affect a significant number of jobs. *P&LE IV*, *slip op.* at 51-53.

Despite contrary trends in recent case law and public policy, and despite the unfortunate effect that a status quo injunction may have on the railroad's ultimate survival, the court found a clear statutory mandate to require bargaining under the RLA and affirmed the district court's order. *Id.* at 59, 64-67.

The court now moves on to address the specific areas of dispute between the parties. The first matter that must be discussed is the question as to whether the ICC's exemption of a sale, pursuant to § 10505 of the ICA and the ICC's rulemaking in *Ex Parte 392*, from the prior approval requirements of § 10901 operates to relieve the carrier of the negotiation obligations imposed on it by § 6 of the RLA.

Preemption

In *P&LE IV*, the Third Circuit, however reluctantly, held that the ICA did not preempt the field of labor protection in rail transportation transactions, and thus the sale of a railroad's assets, exempted by the ICC from the ICA's prior approval requirements, could not be consummated until the railroad had exhausted the bargaining requirements of the RLA. In the instant case, CSXT argues that *P&LE IV* was wrongly decided and conflicts with the Second Circuit's decision in *Staten Island* and this court's decision in *Decker*. *See* Item 39, pp. 5-6. The court agrees that the *P&LE IV* decision results in a conflict with the decision in *Decker*; the more difficult question is whether the *Staten Island* and *P&LE IV* cases are distinguishable and thus not directly in conflict.

The court in *P&LE IV* found *Staten Island* "clearly distinguishable" by virtue of the fact that the transaction in *Staten Island* was an abandonment/sale pursuant to § 10905, rather than a sale to a new carrier under § 10901. *See* notes 8 and 9, *supra*, and accompanying text.

> Section 10905 is a forced sale provision, requiring a financially ailing railroad to sell its assets to a financially responsible purchaser, as an alternative to abandonment of the line under § 10903. The ICC order in [*Staten Island*] therefore stated that the seller "*must* complete the sale so long as the buyer consummates." 792 F.2d at 11 (emphasis added). The court therefore held that an injunction against sale could not be granted "without re[s]cission or modification of the ICC's order" mandating the consummation of the sale; such an attack, of course, would only be appropriate on direct appeal from the ICC order. *Id.* at 12.

P&LE IV, No. 88-3797, *slip op.* at 42-43, n.27. The court found that the mandatory nature of the ICC's order distinguished that case from one involving a permissive order under § 10901, and thus refused to find that a status quo injunction pending RLA bargaining was an impermissible collateral attack on an ICC order authorizing the sale. *Id.*

Upon reconsideration, *see* Fed.R.Civ.P. 59(a)(2); *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978), it appears as though the Third Circuit's reasoning with regard to the *Staten Island* case is equally applicable in the instant case. The sale of the Buffalo-Eidenau line was authorized under the "permissive" provisions of the ICA, *i.e.*, §§ 10901 and 10505, and exempted pursuant to *Ex Parte 392*, and thus,

> the ICC has made no finding that the public interest *requires* this transaction, that the transaction *must* proceed, or that a delay in (or even collapse of) the transaction would *harm* the public interest. Therefore, [a status quo injunction would] not conflict with the public interest as determined by the ICC's order, because the injunction [would] merely [grant] a *delay* in the transaction, and the possibility that

> labor might win some protection for itself at the bargaining table.

P&LE IV, No. 88-3797, *slip op.* at 42 (emphasis in original). The fact that the court in *Staten Island* specifically referred to the mandatory language in the ICC's order is of significance, since the court read that order to "require" the carrier to go through with the sale if the buyer was willing. 792 F.2d at 12. Such a reading of an individual abandonment/sale order should not be interpreted as a mandate that every ICC order involving a sale of a rail line, under all authorization provisions of the ICA, be implemented regardless of the parties' RLA bargaining obligations, especially where (as in the instant case) the order merely exempts a new carrier from ICA requirements without making a finding that the public convenience or necessity requires, or even permits, the transaction. *See* 49 U.S.C. § 10901(a).

As a further distinguishing factor, the instant case presents a significantly different factual situation from that faced by the court in *Staten Island* in that the sale by CSXT to B&P of the Buffalo-Eidenau line has not yet been consummated, whereas the sale of the Staten Island Railroad had already gone through by the time the unions sought relief in federal court. In other words, Staten Island Railroad "won the race to the courthouse" (*see* Item 40, p.92), and the status quo had already been altered, thus leaving nothing for the court to preserve by way of injunction without unraveling the negotiated, fully consummated sale. Here, the status quo remains intact, and its preservation at this juncture would not "unravel" or otherwise interfere with the sale other than to delay consummation until such time as the parties can negotiate about the exact effects that the sale will have on the employees working on the Buffalo-Eidenau line. This court could, if appropriate, grant the unions' request for injunctive relief "without re[s]cission or modification of the ICC's order." 792 F.2d at 12.

As a more general matter, this court agrees with the Third Circuit's reasoned analysis of the interplay between the ICA and the RLA, and agrees with that court's finding that the ICC's jurisdiction over the authorization of proposed rail transactions does not preempt any potentially inconsistent bargaining duties under the RLA. *See P&LE IV*, No. 88-3797, *slip op.* at 56. Reading the two statutes "in harmony, avoiding unnecessary conflict," *id.* at 50; *see generally Watt v. Alaska*, 451 U.S. 159, 266-67 (1981), the Third Circuit found that, while significant tension does exist between the different means used by the ICA and the RLA to achieve a similar statutory purpose, *i.e.*, the promotion and protection of interstate rail transport, Congress intended these statutes to coexist. *P&LE IV*, No. 88-3797, *slip op.* at 49, 55. The primary policy goal of the RLA is labor peace, which necessarily means concessions by management, whereas the interests of labor are of relatively small significance in the overall policy scheme of the ICA, and thus, Congress could not have intended that rail labor look to the ICC as its sole source of protection. *Id.* at 51-53, 56. Absent some clearer expression of any such congressional intent, the court refused to ignore the RLA's mandate that the carrier bargain with its unions prior to completion of the sale. *Id.* at 63.

Accordingly, since today's findings are in conflict with this court's prior dismissal of the unions' claims in *Decker*, 672 F. Supp. 674, that dismissal is hereby vacated pursuant to Fed.R.Civ.P. 59(a)(2), and the action (CIV-87-1147C) is consolidated with the instant action under the docket number CIV-87-1391, pursuant to Fed. R.Civ.P. 42(a).

Major/Minor Dispute

Once it has been determined that the dispute resolution processes of the RLA are not preempted in this case by the ICC's authorization of the Buffalo-Eidenau line

sale, it becomes necessary to determine whether the dispute between CSXT and the unions is "major," and thus subject to the RLA's bargaining process before the sale can be consummated, or "minor," and thus subject to the RLA's formal grievance process while the sale goes through. CSXT contends that the dispute is a minor one, since the sale of the line is based on the reduction-in-force [RIF] and job abolishment provisions in the collective bargaining agreements, the absence of any restrictions on such a sale in those agreements, and on the carrier's established past practice of selling or abandoning rail lines without engaging in RLA bargaining over each such instance.[10] According to CSXT, these bases for its right to sell the line relate to the interpretation or application of existing agreements with the unions, and the dispute is therefore a minor one under the RLA and the interpretive case law.

The unions, on the other hand, contend that the dispute involves the elimination, as a result of the sale, of the seniority rights and job security which the employees on the Buffalo-Eidenau line have accrued, which result clearly alters the rights and working conditions of those employees and thus presents a major dispute. Defendants allegedly do not challenge the carrier's rights under the existing agreements to abolish jobs and reduce the work force; defendants do, however, challenge the carrier's reliance on its past practice of selling rail lines without prior bargaining as relevant support for the carrier's interpretation of its contractual rights.

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[10] CSXT also contends that the Section 6 notices served by several of the defendants demanding that the carrier bargain over the sale were barred by the moratorium provisions in the agreement, and that the carrier's interpretation of those provisions presents a minor dispute. While this contention has merit, it is also moot, since the moratorium on bargaining about previously negotiated matters expired on April 1, 1988, and the unions have served new Section 6 notices subsequent to that date. *See* Defendants' Exh. N.

Under the Supreme Court's formulation in *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, 723-24 (1945), a major dispute involves the formation or alteration of agreements, and thus deals with the prospective acquisition of contractual rights, while a minor dispute, in contrast, involves the application of the terms of an existing agreement, and thus deals with contractual rights previously accrued. 325 U.S. at 723; *see Local 553, Transport Workers v. Eastern Air Lines*, 695 F.2d 668, 673 (2d Cir. 1982).

Major disputes:

> arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> [A minor dispute], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.

Elgin, J. & E.R. Co. v. Burley, 325 U.S. at 723.

In the instant case, as in many cases under the RLA, the difference between viewing the dispute as an attempted acquisition of future rights on the one hand or as an assertion of vested rights on the other is a matter of degree. The dispute between CSXT and its employees, in very basic terms, comes down to whether the carrier has the unilateral right to sell one of its less profitable line operations, and thereby abolish all CSXT positions on that line, without bargaining with the unions about protections for its employees who will be affected by that sale.

> It is a major dispute if the present agreements between the railroad and the brotherhoods contain express provisions contrary to the position taken by the railroads or if the clear implication of these agreements is inconsistent with the railroad's proposals. It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; and it is also minor if what the railroad seeks to do is supported by customary and ordinary interpretations of the language of the agreements.

Rutland Railway Corp. v. Brotherhood of Locomotive Engineers, 307 F.2d 21, 33-34 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Thus, in attempting to resolve the "major/minor" dilemma, courts have looked to the collective bargaining agreements in effect between the parties to determine whether a "plausible interpretation" of those agreements would justify the carrier's action. *Local 553*, 659 F.2d at 673. The dispute has been found to be major if the court's examination of the agreements shows that "the carrier's contractual justification for its actions is 'obviously insubstantial.'" *Id.; see UTU v. Penn Central Transp. Co.*, 505 F.2d 542, 544 and n.5 (3d Cir. 1974) (*per curiam*); *see also Airline Stewards & Stewardesses Ass'n, Local 550 v. Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289, 291 (1st Cir. 1969). The dispute is minor if the agreement is "reasonably susceptible" to the carrier's interpretation. *Local 553*, 695 F.2d at 673; *see So. Pac. Transp. Co. v. UTU*, 491 F.2d 830, 833 (9th Cir.), *cert. denied*, 416 U.S. 985; *UTU v. Burlington No., Inc.*, 458 F.2d 354, 357 (8th Cir. 1972). The district court's task in this regard is not to interpret the agreements; it is to determine whether the carrier's claimed contractual defense is frivolous or "so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by § 6 for alteration of existing agreements." *So. Ry. Co. v. Bro. of Loc. Fire & Eng.*, 384 F.2d 323, 327 (D.C. Cir. 1967); *see Airline*

Stewards, 412 F.2d at 290. Further, the degree of scrutiny by the court is "clearly light, since ultimate resolution of the dispute is for the arbitrator." *Marine Central R.R. Co. v. UTU*, 787 F.2d 780, 783 (1st Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 169 (1986).

In the instant case, CSXT claims that it has the contractual right to sell the B&E line without prior bargaining, as embodied in the RIF clauses in the existing collective bargaining agreements. A typical RIF clause provides, in relevant part:

> (a) When it becomes necessary to reduce expenses, the forces at any point or in any department or subdivision thereof shall be reduced, seniority to govern; and employees affected to take the rate of the job to which they are assigned.
>
> (b) (1) Five working days' advance notice will be given to employees affected before the abolishment of positions or reduction in force, and list of employees affected will be furnished to the local committee . . . .

Plaintiffs' Exhibit 22.

The unions argue that they have never challenged the carrier's right, as embodied in these provisions, to abolish jobs or to reduce the work force when necessary. Defendants contend that such provisions do not specifically deal with line sales of the type pending between CSXT and B&P, and thus do not adequately provide for the protection of the employees' seniority rights which, according to defendants, will be rendered meaningless by the sale. Defendants thereof claim that what they have sought to do by serving § 6 notices is to supplement the existing rights of affected employees by obtaining new rights in an attempt to ameliorate the contemplated effects of the sale.

In light of the prior cases deciding the major/minor issue, it is apparent that this court is limited in the

instant inquiry to determining whether CSXT's contractual defense of its right to sell is "frivolous" or "obviously insubstantial." Once it has examined the RIF provisions in the existing agreements and the past practices of the parties in prior line sales to determine whether a reasonable interpretation of those provisions and practices would justify CSXT's action, this court's inquiry must end. "[I]t is not for it to weigh, and decide who has the better of the argument. If the court did this, it overstepped its bounds and usurped the arbitrator's function." *Maine Central*, 787 F.2d at 782.

With regard to the RIF clauses, it is clear that these provisions at least arguably support CSXT's contention that it has the right to sell the Buffalo-Eidenau line. Given the degree of scrutiny which the court is constrained to employ, that contention cannot be considered "frivolous" or "obviously insubstantial," even in light of the unions' concession that such an inherent management prerogative indeed exists. Also persuasive is the carrier's contention that its right to sell without bargaining is supported by its prior sale of ten different line segments without objection by the unions that these sales violated the agreements of the RLA.[11] In defense

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[11] *See* Plaintiffs' Exh. 5. Those sales include:

LINE SEGMENT	DATE OF SALE
Greenspring, WV-Petersburg, WV	10-15-78
Flora, IL-Shawneetown, IL	10-01-79
Knox, PA-Mt. Jewett, PA	01-15-82
Landenburg Jct.-Hockessin, De	08-13-82
Flora, IL-Sangamon Jct., PA	03-31-83
Carton, OH-Frankfort, OH	03-31-85
Charleston, WV-Clendenin, WV	05-30-85
Haywood-Spelter, WV	03-31-86
Ashford, NY-Rochester, NY	07-20-86
Firebrick, OH-RA Junction, OH	03-31-87

of its proposed operational changes, a carrier is not limited to the collective bargaining agreements to demonstrate a contractual basis for its action, but may rely on "those actual, objective working conditions out of which the dispute arose, and clearly those conditions need not be covered in an existing agreement." *Detroit & Toledo Shore Line*, 396 U.S. at 153; *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 799 (1st Cir. 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 111 (198[7]). In order for past practices to be considered "actual, objective working conditions," they must have occurred "for a sufficient period of time with the knowledge and acquiescence of the employees . . . ." *Detroit Toledo Shore Line*, 396 U.S. at 154; *Boston & Maine*, 788 F.2d at 799. In the instant case, CSXT points to its sale of line segments on ten prior occasions since 1972 and, more specifically, to the sale of other segments of former B&O lines to the Knox & Kane Railroad in 1982, and to the Rochester & Southern Railroad Company in 1986. *See* note 11, *supra*. In both the Knox & Kane and Rochester & Southern sales, the purchasers were, previous to the sale, non-carriers, and both sales involved job abolishments and employee furloughs. The unions maintain that they did not acquiesce in these prior sales, but instead petitioned (unsuccessfully) the ICC to impose protective conditions, and at least one union (the UTU) served a § 6 notice in connection with the Rochester & Southern sale (that notice was later withdrawn when CSXT took the position, as it originally did with respect to the instant sale, that the notice was barred by the moratorium in its agreement with UTU and by the ICC's exclusive jurisdiction over the sale). The unions also argue that the ICC's practice of not imposing labor protections in such sales to newly formed carriers is of recent origin, commencing in 1982 with the Knox & Kane sale, and has provided the railroads an effective way to dispose of marginally profitable lines

without the costs of employee protections which would be mandatorily imposed in an abandonment situation. Thus, according to the unions, there was no acquiescence in CSXT's past practice of selling lines or, alternatively, any such acceptance of past practice occurred because, prior to 1982, sufficient job protections were in place.

As the First Circuit pointed out in *Maine Central*, the court's role in this type of situation is limited to determining whether the carrier's position is arguable, and when the court endeavors to weigh a party's reasons for not protesting an instance of past practice, "it has looked too hard." *Maine Central*, 787 F.2d at 783. It is therefore evident to this court that CSXT's position with regard to its contractual right to sell the Buffalo-Eidenau line, supported by instances of past practice that were, arguably, accepted by the unions, is not so obviously insubstantial as to be an attempt to circumvent § 6 of the RLA. *See generally Chicago & North Western Transportation Co. v. RLEA*, No. 88-C-44 (N.D. Ill., E.D., March 16, 1988).

In *P&LE IV*, the Third Circuit found the dispute between the carrier and the unions to be major on the basis that the proposed action by PL&E [*sic*] would clearly result in a change in the nature of the collective bargaining agreements in force between the parties. That holding is not binding on this court for several reasons. First, in making its findings, the Third Circuit explained the essence of the P&LE's argument as being one of managerial prerogative rather than contractual justification, and noted that if the crux of the dispute had been about whether the collective bargaining agreement itself permitted or prohibited the sale, the dispute would have been a minor one to be resolved by arbitration. *P&LE IV*, No. 87-3797, *slip op.* at 18, n.9. Here, the essence of CSXT's argument is that the agreements justify its proposed action, and thus the dispute is at least

arguably minor. Second, there is no indication in *P&LE IV* whether and to what extent the collective bargaining agreements in effect between P&LE and the unions provided protections for the employees of that line in the event of a sale. In the instant case, the court heard extensive testimony and was presented with voluminous exhibits which provided evidence of the protections in place under the existing agreements, protections which were, during the normal course of collective bargaining, accepted by the non-operating crafts in lieu of other benefits and rejected by the operating crafts in favor of such benefits. A third distinguishing factor is that, as a result of the sale by P&LE to the new carrier, approximately 500 of 750 P&LE employees would have lost their jobs and would have been placed on furlough status. In the instant case, CSXT will remain in the rail business after the sale of a relatively small portion of its total rail system, and a relatively small number of employees will be furloughed, since the B&P is required by the sales agreement to hire at least 160 former CSXT employees. *See* Exhibit 48; *see also* note 6, *supra*, and accompanying text. Finally, P&LE did not rely, nor could it have relied, on its past practice of selling its assets and going out of business, whereas in the instant case, CSXT's reliance on its past practice of selling line segments without prior bargaining supports its position that it has the contractual right to do so in this instance.

For all of the above reasons, the court finds that a plausible interpretation of the collective bargaining agreements in effect between CSXT and the defendant unions would provide a substantial contractual justification for the sale of the Buffalo-Eidenau line without additional bargaining. The dispute between CSXT and the unions is therefore minor, and subject to binding arbitration before the National Railroad Adjustment Board, pursuant to § 3 of the RLA, 45 U.S.C. § 153. Upon meeting with

the parties, the court will frame and issue an appropriate order.

So ordered.

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

Dated: May 26, 1988

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-87-1391C

CSX TRANSPORTATION,

Plaintiff,

—VS—

UNITED TRANSPORTATION UNION ("UTU"); F.A. HARDIN, President (UTU); J. A. CIANCIOTTI, General Chairman, (UTU(E)); ROBERT EARLEY, General Chairman, B&O General Committee of Adjustment (UTU (C&T)); UNITED TRANSPORTATION UNION YARDMASTERS DEPARTMENT ("RYA"); B.R. CARVER, President (RYA); RICHARD P. DEGENOVA, General Chairman ((RYA); AMERICAN TRAIN DISPATCHERS ASSOCIATION ("ADTA"); R.J. IRVIN, President (ATDA); D.W. BRANHAM, General Chairman (ATDA); BROTHERHOOD OF LOCOMOTIVE ENGINEERS ("BLE"); L.D. MCFATHER, President (BLE); J.A. LECLAIR, General Chairman ("BLE); BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES ("BMWE"; G.N. ZEH, President (BMWE); B.J. TWIGG, General Chairman (BMWE); TRANSPORTATION COMMUNICATIONS UNION ("TCU"); R.D. KILROY, International President (TCU); R.F. MALCOLM, General Chairman, C&O System Board of Adjustment, Brotherhood of Railway, Airline and Steamship Clerks ("BRAC"); L.H. TACKETT, General Chairman, B&O System Board of Adjustment No. 6, BRAC; TRANSPORTATION COMMUNICATIONS UNION, Carmen Division ("CARMEN"); C.E. WHEELER, President, (CARMEN); M.L. CRAWFORD, General Chairman (CARMEN); and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ("IAM"),

Defendants.

ORDER AND PERMANENT INJUNCTION

Upon the Complaint and Counterclaim, Motion, Memorandum of Points and Authorities and Supporting Affidavits filed by Plaintiff CSXT Transportation, Inc. ("CSXT") and Defendants United Transportation, *et al.*, this cause came on for hearing with notice to Defendants and after a trial on the merits during April 13-19, 1988;

1. This Court issued an opinion, dated May 26, 1988, finding that this case presents a minor dispute within the meaning of the Railway Labor Act over which the National Railroad Adjustment Board has exclusive jurisdiction.

2. This Court has jurisdiction to enjoin strikes or threatened strikes over minor disputes since such strikes or threats violate the Railway Labor Act.

3. Defendants have threatened to engage in picketing, concerted self-help activity and interference with Plaintiff's operation if Plaintiff consummates the sale of its rail lines between Buffalo, New York and Eidenau, Pennsylvania. Defendants' strike threat will continue to occur unless enjoined by Order of this Court.

4. Defendants have stipulated that a strike will cause immediate and irreparable injury, loss and damage, in the way of cancelled and delayed railroad service, to Plaintiff and to the free flow of interstate commerce.

5. Further delay of the sale will imperil the future of these rail lines and damage their chances for long-term viability and any rail employment on them.

6. Plaintiff has no adequate remedy at law, and the failure to grant Plaintiff the relief requested will cause greater damage to Plaintiff than granting such relief will cause Defendant. Defendants have an adequate remedy at law under the RLA through the National Railroad Adjustment Board.

7. The above facts constitute good and sufficient grounds for the issuance of a Permanent Injunction.

NOW THEREFORE, IT IS ORDERED THAT

1. Defendants and each of their officers, agents, employees, and representatives, and all persons acting in concert or participating with them, be and hereby are permanently restrained from authorizing, calling, causing, inducing, conducting, permitting, continuing in, or engaging in any strike, picketing, patrolling, self-help or disruptive behavior in any manner designed, intended or with the effect of preventing or otherwise interfering with the sale of the Buffalo-Eidenau Line.

2. Defendants and each of their members shall issue such notices and instructions and take all other necessary steps to carry into effect the intent of this Permanent Injunction and Defendants shall present to this Court and to CSXT evidence of all actions taken in compliance herewith not later than 2:00 p.m., June 6, 1988.

3. Service of this Order and Injunction may be made by personal service or by certified mail return receipt requested to the business address of each of the Defendants, and such service shall constitute actual notice of this Permanent Injunction.

4. Defendants' request for declaratory relief, directing the Plaintiff to comply with all dictates of the Railway Labor Act including its obligation to bargain with Defendant Unions over notices served pursuant to Section 6 of the Railway Labor Act, 45 U.S.C. § 156, prior to April 1, 1988, in connection with the sale of the Buffalo-Eidenau Line, is denied.

5. While CSXT can proceed with the sale of the line, CSXT is ordered to bargain with Defendant unions, consistent with the requirements of the Railway Labor Act, over notices served pursuant to Section 6 of the

Railway Labor Act, 45 U.S.C. § 156, on or after April 1, 1988, in connection with the sale of the Buffalo-Eidenau Line.

6. The Court retains jurisdiction to issue all other and further relief in law and equity as it deems just and proper.

So ordered.

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

Dated: June 2, 1988

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-87-1391C

CSX TRANSPORTATION,

Plaintiff,

—VS—

UNITED TRANSPORTATION UNION ("UTU"); F.A. HARDIN, President (UTU); J. A. CIANCIOTTI, General Chairman, (UTU(E)); ROBERT EARLEY, General Chairman, B&O General Committee of Adjustment (UTU (C&T)); UNITED TRANSPORTATION UNION YARDMASTERS DEPARTMENT ("RYA"); B.R. CARVER, President (RYA); RICHARD P. DEGENOVA, General Chairman ((RYA); AMERICAN TRAIN DISPATCHERS ASSOCIATION ("ADTA"); R.J. IRVIN, President (ATDA); D.W. BRANHAM, General Chairman (ATDA); BROTHERHOOD OF LOCOMOTIVE ENGINEERS ("BLE"); L.D. MCFATHER, President (BLE); J.A. LECLAIR, General Chairman ("BLE); BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES ("BMWE"; G.N. ZEH, President (BMWE); B.J. TWIGG, General Chairman (BMWE); TRANSPORTATION COMMUNICATIONS UNION ("TCU"); R.D. KILROY, International President (TCU); R.F. MALCOLM, General Chairman, C&O System Board of Adjustment, Brotherhood of Railway, Airline and Steamship Clerks ("BRAC"); L.H. TACKETT, General Chairman, B&O System Board of Adjustment No. 6, BRAC; TRANSPORTATION COMMUNICATIONS UNION, Carmen Division ("CARMEN"); C.E. WHEELER, President, (CARMEN); M.L. CRAWFORD, General Chairman (CARMEN); and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ("IAM"),

Defendants.

SUPPLEMENTAL ORDER

Defendants have requested, and plaintiff does not oppose, the substitution of Dwight D. Vance for individual defendant R.F. Malcolm, as Mr. Vance has recently replaced Mr. Malcolm as General Chairman, C&O System Board of Adjustment, Transportation Communications Union. That request is hereby granted.

At a meeting held on June 1, 1988, to settle the proposed judgment in this case, defendants requested a specific ruling on its request for a declaratory judgment. The court believes that this request was covered in its original decision and judgment, either explicitly or implicitly, but if there is any doubt remaining, the following findings are made to clarify.

The court finds that CSXT has satisfied the requirements of Section 8 of the Norris LaGuardia Act, 29 U.S.C. § 108. With respect to the parties' disagreements over the validity of pre-April 1, 1988 Section 6 notices and CSXT's right to sell the Line, CSXT has complied with any obligation imposed by law by submitting these disagreements to arbitration. Because this Court found these disagreements present minor disputes, CSXT was not required to bargain over these matters in order to satisfy Section 8. *Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 40 (2d Cir. 1962), *cert. denied*, 371 U.S. 954 (1963).

Witr respect to the post-April 1, 1988 notices, the Court also finds no violation of Section 8. Both parties sought judicial declaration of their rights and obligations. Neither CSXT nor the unions exhibited bad faith by relying on their positions before this Court declared their respective obligations. Just as CSXT had refused to bargain over the April 1, 1988 notices, the unions had threatened to strike over a minor dispute. This Judgment declares CSXT's obligation to bargain over these notices and the unions' obligation not to strike.

Because these notices were only recently served, there has been no significant delay in the RLA procedures. CSXT has indicated it will engage in bargaining consistent with the requirements of the RLA, as determined by this Court. Additionally, prior to this Court's May 26, 1988 opinion, CSXT also made every reasonable effort to resolve these disputes by offering, without prejudice to its position on bargaining, to make an agreement for severance payments and other benefits for employees affected by the sale.

Also at the June 1, 1988 meeting, the defendants urged that a stay of the issuance of the judgment be entered to permit the National Railroad Adjustment Board (NRAB) to rule on the issue to be presented to that tribunal in accordance with the decision and judgment of this court. Mr. Clarke, in behalf of all defendants, urges that a stay should be granted to permit the NRAB to take up the Union's argument that the current collective bargaining agreements do not cover sales of rail lines and the impact of such sales on employees. This argument was dealt with in the court's principal decision, and it is not a basis upon which a stay should be granted. Mr. Collins, in behalf of the engineers and other operating craft unions, urges that irreparable harm will befall his clients if this relief is not given. The court has considered this argument along with the record and findings made in the decision. It may be that, based upon the collective bargaining agreements, little relief may be afforded to his clients by the NRAB. However, it is clearly not the function of the court to interpret the relevant agreements. It does appear to the court that, under the circumstances, it would be inappropriate to stay the effect of the judgment until such time as the NRAB acts. It is conceded by the plaintiff that many union members will receive relief. Some may get extensive relief and, unhappily, some may get little, but staying the judgment should have no impact on the decision of the NRAB.

The appropriate place for the defendants to get further relief at this stage is in the Court of Appeals. The defendant unions' application for a short stay to take this step is granted. The judgment permitting the sale is stayed pursuant to Rule 8 of the Federal Rules of Appellate Procedure, under the following terms:

1. This stay shall expire on June 16, 1988, unless extended by the Court of Appeals.

2. It is the responsibility of defendant unions to promptly file papers with the Court of Appeals so that that Court may have the opportunity to fairly consider the application.

So ordered.

/s/ John T. Curtin
JOHN T. CURTIN
United States District Judge

Dated: June 2, 1988

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of June one thousand nine hundred and eighty-nine.

Present: HON. FRANK X. ALTIMARI,
HON. J. DANIEL MAHONEY, Circuit Judges.
HON. RAYMOND J. DEARIE, District Judge.*

Docket No. 88-7461

CSX TRANSPORTATION, INC.,
Plaintiff-Appellee,

-v.-

UNITED TRANSPORTATION UNION, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of New York

[Filed June 7, 1989]

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* The Honorable Raymond J. Dearie, United States District Judge for the Eastern District of New York, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants. It is further ordered that appellants' post-argument motion to vacate and remanded is denied.

ELAINE B. GOLDSMITH
Clerk

/s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

Issued as Mandate: Sept. 20, 1989

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-ninth day of August, one thousand nine hundred and eighty-nine.

Docket Number 88-7461

CSX TRANSPORTATION, INC.,
Plaintiff-Appellee,

v.

UNITED TRANSPORTATION UNION, *et al.*,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant UNITED TRANSPORTATION UNION ET AL.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX G

SPECIAL BOARD OF ADJUSTMENT NO. 1018

(Established by Arbitration Agreement dated July 15, 1988 between CSX Transportation, Inc. and certain Labor Organizations)

CSX TRANSPORTATION, INC.
AND
UNITED TRANSPORTATION UNION
UNITED TRANSPORTATION UNION,
YARDMASTERS DEPARTMENT
AMERICAN TRAIN DISPATCHERS ASSOCIATION
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
TRANSPORTATION•COMMUNICATIONS
INTERNATIONAL UNION
TRANSPORTATION•COMMUNICATIONS
INTERNATIONAL UNION, CARMEN DIVISION
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS
INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
BROTHERHOOD OF RAILROAD SIGNALMEN

Hearing held at National Mediation Board,
Washington, D.C., October 18, 1988

APPEARANCES

For the Carrier:

Ronald M. Johnson, Esq.
Akin, Gump, Strauss, Hauer & Feld

For the Organizations:

William G. Mahoney, Esq.
Highsaw & Mahoney, P.C.

INTRODUCTION

This matter comes before the Board as the result of a Memorandum of Agreement dated July 15, 1988 between CSXT Transportation, Inc. ("Carrier") and 12 labor organizations representing Carrier employees ("Organizations") establishing a Special Board of Adjustment in accordance with Section 3 Second of the Railway Labor Act ("RLA"). The parties agreed that the Board would "hear and decide issues submitted by the Carrier and the Organizations arising from the sale by the Carrier of its line of railroad between Buffalo, New York and Eidenau, Pennsylvania".

The contentions of the Carrier and the Organizations as to the Carrier's right to dispose of the Buffalo-Eidenau Line without bargaining with the Organizations led to a decision by the United States District Court for the Western District of New York on May 26, 1988 (*Decker v. CSX Transportation, Inc.* 688 F. Supp. 98, (W.D.N.Y. 1988) ("*Decker*"). In *Decker*, the Court found at the outset that:

> The question presented is whether a railroad has a duty to refrain from completing a sale of one of its rail lines pending bargaining under the RLA over the effect of that sale on the employees of that line when the Interstate Commerce Commission [ICC] has granted expedited approval to the proposed sale without imposition of labor protective conditions.

After reviewing the question of whether the dispute was "major" or "minor" as construed under the RLA, the court concluded:

> [A] plausible interpretation of the collective bargaining agreements in effect between CSXT and the defendant unions would provide a substantial contractual justification for the sale of the Buffalo-Eidenau line without additional bargaining. The dispute between CSXT and the unions is therefore

minor, and subject to binding arbitration before the National Railroad Adjustment Board, pursuant to § 3 of the RLA, 45 U.S.C. § 153.

The Organizations appealed the District Court's ruling, on an expedited basis, to the U.S. Court of Appeals for the Second Circuit. The Organizations obtained from the Court of Appeals a temporary stay of the line sale. On July 18, 1988, the Court of Appeals lifted its stay, allowing the sale to be consummated on July 19, 1988. At that time, the purchaser, Buffalo & Pittsburgh Railroad, Inc., assumed operation of the line with its own employees. The appeal remains with the Court of Appeals for review.

Based on their disparate approaches to the dispute, the Carrier and the Organizations provided the Board with widely divergent views as to the statement of the issues to be resolved by the Board. The Carrier set forth the following as the questions at issue:

1. Have the Organizations sustained their burden of proof that the Carrier does not have the unilateral right, under its existing collective bargaining agreements and past practices, to dispose of its rail lines between Buffalo, New York and Eidenau, Pennsylvania?

2. Have the Organizations sustained their burden of proof that the abolishment of the line and yard gangs on the Buffalo North, Buffalo South and Pittsburgh West Seniority Districts, as a result of the disposition of the rail lines between Eidenau and Buffalo, violates the current Schedule Agreement of the Brotherhood of Maintenance of Way Employees?

3. Have the Organizations sustained their burden of proof that the sale violated Rule 1(b) of the Schedule Agreement of the Transportation Communications Union (C&O)?

The Organizations presented the following issues:

1. Does this Board have jurisdiction to decide the issued presented by the Carrier?

2. Does the sale of the Buffalo to Eidenau line change the rates of pay, rules, or working conditions of those CSXT employees who work on or in connection with the Buffalo to Eidenau line as those employment terms are embodied in their Agreements?

3. If the answer to the Organizations' Question Number 2 is in the affirmative, which rule (or rules) in the collective bargaining agreements is (are) changed, and is there a rule (or rules) which authorize(s) the Carrier to, prohibit(s) the Carrier from making each such change?

4. If the answer to Organizations' Question Number 2 is in the affirmative, and there is no rule or rules which authorize(s) the Carrier to take such action, what remedy should this Board impose?

5. Does the Carrier's action in removing clerical work and abolishing clerical positions on the Buffalo to Eidenau line violate Rule 1(b) of the C&O General Clerical Agreement?

6. Does the reduction in the number of line and yard gangs assigned to the Buffalo North, Buffalo South and Pittsburgh West Subdivisions violate Rules 11(b), 67 and 68 of the Agreement between the Baltimore and Ohio Railroad Company and the Brotherhood of Maintenance of Way Employes ("BMWE") effective October 1, 1968 as supplemented by Addendum 10, effective September 1, 1975?

7. If the answer to either or both Organizations' Question Numbers 5 and 6 is in the affirmative, what remedy should this Board impose?

As further background, the Buffalo-Eidenau Line is a 369-mile segment of the Carrier's 21,000-mile railroad system. Affected by the sale were 230 employees represented by the Organizations. As will be discussed in more detail below, the sale was approved by the Interstate Commerce Commission without the imposition of protective benefits for the affected employees. Beginning on April 15, 1987, some of the Organizations served Notices on the Carrier under Section 6 of the RLA, calling on the Carrier to negotiate agreements as to the impact of the sale on, as stated by the Organizations, "the employees' existing collective bargaining rights". These Section 6 Notices were rejected by the Carrier, based on existing moratoria on such notices until April 1, 1988. The Organizations initiated new Section 6 Notices on April 1, 1988, which Notices remain in active status. As noted above, the sale became effective July 19, 1988, subsequent to *Decker*, the appeal to the Court of Appeals, and the Memorandum of Agreement establishing the Board.

As a preliminary procedural matter, the Board must first determine the appropriate statement of the issues for its resolution. The Board notes again that the genesis of its jurisdiction is found in the Court's findings in *Decker*. It follows that the Carrier has the burden to demonstrate its rights under existing collective bargaining agreements or asserted past practice to justify its unilateral action abolishing the positions involved in connection with the sale of the Buffalo-Eidenau line. Insofar as violation of specific contract terms involving agreements between the Carrier and the Brotherhood of Maintenance of Way Employees and the Transportation•Communications Union, the Organizations are patently required to set forth their bases for such contentions. That the Board has jurisdiction to review and make findings in these questions is clearly found in *Decker* as well as in the parties Memorandum of Agreement establishing the Board. The question of jurisdiction will be further reviewed in the discussion below.

As a result, the Board determines that the following questions fairly encompass the issues for resolution:

1. Did the Carrier have the unilateral right, under existing collective bargaining provisions or past practice, to abolish its positions in connection with the sale of the Buffalo-Eidenau Line without first negotiating with the Organizations as to the affected employees?

2. Did the Carrier's action affecting clerical positions on the Buffalo-Eidenau Line violate Rule 1(b) of the Chesapeake and Ohio General Clerical Agreement?

3. Did the Carrier's action in reference to line and yard gangs assigned to the Buffalo North, Buffalo South, and Pittsburgh West Subdivisions violate Rules 11(b), 67 and 68 of the Agreement between the Baltimore and Ohio Railroad Company and the Brotherhood of Maintenance of Way Employes effective October 1, 1986 [*sic*] as supplemented by Addendum 10, effective September 1, 1975?

(The former Chesapeake and Ohio Railway Company ("C&O") and the former Baltimore and Ohio Railroad Company ("B&O") are surviving components of the Carrier, which administers the collective bargaining agreements of the C&O and B&O.)

FINDINGS

As indicated earlier, the District Court in *Decker* found that the dispute between the parties was "minor" since "a plausible interpretation of the collective bargaining agreements in effect between CSXT and the defendant unions would provide a substantial contractual justification for the sale of the Buffalo-Eidenau Line without additional bargaining". The Court based its conclusion that the dispute was "minor" on findings that the RIF provisions "at least arguably" supported CSXT's

contention that it had a unilateral right to sell, and that therefore this contention was not "frivolous" or "obviously insubstantial"; and further that the reliance by CSXT on past practice was also "arguable".

The Court stopped short of making any substantive findings as to the parties' rights. In its opinion the Court stated:

> [O]nce it has examined the RIF provisions in the existing agreements and the past practices of the parties in prior line sales to determine whether a reasonable interpretation of those provisions and practices would justify CSXT's action, this court's inquiry must end. "[I]t is not for it to weigh, and decide who has the better argument. If the court did this, it overstepped its bounds and usurped the arbitrator's function." *Maine Central*, 787 F. 2nd at 782.

The Court, in concluding that the dispute was "minor", in effect found that the issues were at least *prima facie* arbitrable and charged this Board with the responsibility to determine whether, after detailed analysis, the existing agreements or past practice entitled CSXT to take the action that it did.

The Court distinguished this case from *RLEA v. Pittsburgh & Lake Erie*, 845 F. 2nd 420 (3rd Cir. 1988) (holding the dispute to be "major", and requiring Carrier to bargain over effects of the decision to sell), pointing out that in that case there was no issue as to whether the agreement permitted or prohibited the sale; that past practice of selling without prior bargaining was not in issue; that there was no evidence in that case of any unemployment protections in the event of a sale; and that, unlike the instant case, 500 of the 750 employees would lose their jobs.

While it is arguable, as Carrier asserts, that the Court's remanding a "minor" dispute to the National Railroad

Adjustment Board for binding arbitration precludes this Board from examining the Organizations' claim of non-arbitrability, it must be pointed out that these parties, in establishing this Board, agreed that it "will have authority to the same extent that the National Railroad Adjustment Board would have had authority to hear and decide cases submitted by the Carrier and the Organizations arising from the sale by the Carrier of its line of railroad between Buffalo, New York, and Eidenau, Pennsylvania". Section 3 First (i) of the Railway Labor Act empowers the NRAB to resolve disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions . . .". Thus, the determination of whether agreement language exists so as to vest this Board with jurisdiction to consider the dispute on the merits is clearly a power granted to this Board by the parties as permitted under the Railway Labor Act. Conversely, this Board is empowered to find that the absence of any express contractual language or past practice suggesting an implied agreement precludes it from making any determination on the merits.

Under the circumstances, however, it is unnecessary in the resolution of this dispute to make any determinations with respect to jurisdiction or arbitrability. If the actions of the Carrier were impermissible under either the agreements or Carrier's asserted past practice, then the dispute should be found in favor of the Organizations—not because the Carrier's contentions are not arbitrable, but because they lack merit.

Carrier's Contentions

The Carrier contends that, under its collective bargaining agreements with the Organizations, it had the unilateral right to dispose of its rail line and permanently abolish positions without first negotiating with the Organizations as to the effect on employees.

The Carrier argues that if it has the inherent managerial prerogative to sell its rail line (which the Organizations concede), it necessarily follows that it has the right to reduce its work force to reflect changes in its operations and in its business as it relates to such sale. Agreement support for this position, the Carrier asserts, is found in the Reduction In Force (RIF) or furlough provisions in the agreements with the various Organizations. An example of such provisions is found in the schedule agreement with the Firemen & Oilers reading:

> (a) When it becomes necessary to reduce expenses, the forces at any point or in any department or subdivision thereof shall be reduced, seniority to govern; and employees affected to take the rate of the job to which they are assigned.
>
> (b) (1) Five working days' advance notice will be given to employees affected before the abolishment of positions or reduction in force . . . .

The Carrier argues that as long as the notice requirements have been met, as they have in this dispute, job abolishments are permitted for any reason, including line sales, under these "broadly drawn" furlough provisions. The Carrier rejects any notion that there is a qualitative difference, under these furlough provisions, between a job that is temporarily abolished because of, for example, a temporary decline in business, and a job that is permanently abolished, as in the case of a line sale. As a practical matter, the Carrier asserts, "[b]ecause of the railroad industry's declining share of the transportation market, virtually every furlough is effectively permanent. Many CSXT employees have been on furlough status for years with no realistic chance of being recalled."

The Carrier further asserts that there is nothing in the collective bargaining agreements with the Organizations that in any way prohibits or restricts the sale of its assets; and there is nothing in these agreements that re-

quires the Carrier to negotiate protective benefits for affected employees before doing so.

The Carrier next contends that the Organizations, over the past 60 years, have had opportunities to bargain limitations on its unilateral right to abolish positions and reduce forces; and the only limitations sought by the Organizations were that advance notice be given and that furloughs be in reverse seniority order. Moreover, the Carrier points to the fact that some Organizations have bargained for and received labor protective provisions in addition to furlough and seniority provisions; and argues that the inclusion of these provisions was a recognition by the Organizations that "CSXT has the right to take actions such as line sales, which will trigger their applicability".

The Carrier further points to the fact that the Organizations, in their April 1, 1988 Section 6 Notices, proposed new limitations on the Carrier's right to abolish positions and reduce forces as a result of line sales. The Carrier maintains that this is an admission that the existing RIF and furlough provisions permit unilateral job abolishments in line sales, subject only to the notice and reverse seniority requirements.

Finally, the Carrier argues that the Buffalo-Eidenau sale was consistent with its longstanding past practices of line sales and abandonments, with no claim by the Organizations that the RIF or furlough provisions did not apply to line sales, or that these sales resulted in a change in working conditions, or otherwise violated any rights contrary to their agreements.

The Carrier points to nine line sales on the former B&O spanning a ten-year period, and 102 abandonments on the former B&O since 1972. According to the Carrier, these sales and abandonments resulted in the abolishment or transfer of assignment, abolishment of positions, and furlough of employees through the same RIF furlough

and other applicable provisions relied upon by the Carrier in the Buffalo-Eidenau sale; and employees affected by the sales received the furlough or labor protection benefits to which they were entitled under their agreements.

The Carrier specifically refers to a sale in 1986 of the Ashford to Rochester, New York segment of the former B&O to a new short line, the Rochester & Southern Railroad Company, as well as a sale of a line segment in January 1982 between Mt. Jewett and Knox, Pennsylvania to another new short line, the Knox & Kane Railroad. In both of these sales, the Carrier contends that the ICC did not impose labor protective requirements on the sales, positions were abolished and employees furloughed, and none of the Organizations objected that the sales violated their agreements, objected that CSXT did not have the right to sell the lines, or argued that the sales were a change in working conditions.

The Carrier maintains that in addition to supporting its construction and application of its agreements, the past practices themselves evidence its unilateral right to sell rail lines and abolish positions as a result of the sale. The Carrier rejects the Organizations' argument that they have not acquiesced in past line sales because they have petitioned the ICC for labor protective conditions. The Carrier points out that the Organizations have never been precluded from complaining that a line sale violated their agreements, even though the sale was approved by the ICC, including sales where the ICC did not impose any labor protective conditions.

Organizations' Contentions

With respect to this Board's jurisdiction, the Organizations contend that this Board has jurisdiction to examine the various collective bargaining agreements to determine if they were violated by the sale. However, the Organizations assert: 1) that this Board has no jurisdiction to determine if the parties, by past practice, had entered

into an implied agreement regarding the line sale waiving the Organizations' statutory bargaining rights, such determination being reserved to the courts; 2) that this Board has no jurisdiction to determine whether Carrier has the unilateral right to dispose of its rail lines, because such resolution necessarily requires this Board to analyze and interpret not only contractual obligations but also statutory duties and obligations created by the Railway Labor Act; 3) that this Board's jurisdiction is limited to the interpretation of a written agreement permitting Carrier unilaterally to sell its rail line, and no such provisions exist; and 4) that even if this Board had jurisdiction to create an implied agreement by reason of past practice, such asserted past practice by Carrier did not constitute acquiescence or waiver by the Organizations with respect to their statutory rights in connection with the line sale.

The Organizations submit that the Carrier has conceded that there is no express provision in any of the agreements specifically permitting the Carrier to sell this line unilaterally prior to the conclusion of any bargaining over the impact of the sale on affected employees. The Organizations further assert that Carrier's reliance on the RIF and furlough provisions is misplaced because they do not provide contractual permission to sell a rail line without negotiation and were not intended to do so. Moreover, the Organizations assert, the "effects of a line sale go far beyond the abolishment of positions . . . [because] not only are the positions on the transferred line abolished, but the work of those positions will never again be available to the affected employees because the Carrier no longer owns the line". As a result, employees' seniority rights are adversely affected, since they no longer have the ability to exercise seniority to obtain the work they had previously performed, even though that work is being performed for the purchasing Carrier at the same location.

As to Carrier's assertion that past practice created an implied agreement, the Organizations contend that there is no probative evidence that there was any consent, acquiescence or waiver by the Organizations that entitled Carrier to sell without first bargaining. With respect to the nine prior sales, the Organizations argue that in each of these sales, either the ICC had imposed labor protective conditions, or the Organizations had sought to obtain employee protections by challenging the ICC's action, or by seeking to negotiate such protections for affected employees. The Organizations emphasize that there was no finding by the District Court that they, by their past reactions to CSXT sales or abandonments, acquiesced to an implied-in-fact term to the various collective bargaining agreements permitting such sales without bargaining over the effects of the sale on employees; and that the Carrier did not request the District Court to make such finding, even though there was full opportunity to do so.

In this connection, the Organizations contend that both they and Carrier management assumed prior to 1982 that the ICC would provide the necessary arrangement to protect employees who were adversely affected; and that when the ICC, for the first time in the Knox & Kane, sale, refused to impose conditions, the Organizations sought to obtain ICC imposed protections. The Organizations also point out that in the Rochester & Southern sale, the Organizations sought by both litigation and negotiation to obtain benefits for their members over and above those provided by the existing collective bargaining agreements. These facts, the Organizations submit, do not establish acquiescence so as to create an implied agreement. In any event, the Organizations argue that this Board does not have jurisdiction even to consider this question; that jurisdiction lies with the federal courts, which are the sole arbiters to determine whether an implied contract was created supporting a conclusion that the Organizations waived their statutory right under the Railway

Labor Act to notice and to an opportunity to bargain over the impact of the sale on their members before the sale occurred.

With respect to Carrier's argument that prior awards support its contention that the Organizations' April 1, 1988 Section 6 Notices "are an admission that existing reduction-in-force and furlough provisions apply to line sales", the Organizations assert that this argument is misplaced. In their Reply Submission, the Organizations state:

> These awards might provide persuasive argument for the proposition that the applicable agreements do not prohibit line sales, and we have not challenged such a proposition in this case. Here, however, the Carrier must somehow demonstrate that the agreements also contain provisions which *authorize* it to consummate the line sale despite the service of a Section 6 Notice and the bargaining requirements of the Railway Labor Act; in other words, the Carrier must identify a provision which affects a waiver of the Organization's statutory right to bargain for protection of employees affected by the sale. Such was the claim made by CSXT before the U.S. District Court and it was that claim which resulted in the "minor" dispute ruling of that Court. (Underscoring in original)

Finally, the Organizations contend that with the exception of two instances, noted below, the sale neither violated any agreement nor was authorized by any agreement. What transpired, however, according to the Organizations, was that the sale "changed" the established seniority rights to CSXT employees, i.e., causing the work of these jobs to disappear. Under these circumstances, the Organizations maintain that this Board has no jurisdictional basis upon which to fashion a remedy or to make any judgment with respect to Carrier's actions; and any attempt on the Board's part to "rectify the changes in

the working conditions occasioned by the sale . . . would be creating new contractual rights where none exist". The Organizations emphasize, however, that the absence of a contract violation with respect to the sale in no way detracts from its contention that the sale violated the Organizations' statutory rights to notice, to bargain, and to the preservation of the status quo, all granted under the provisions of the Railway Labor Act.

CONCLUSIONS

It must be emphasized at the outset that this Board's mandate does not include any determination of the nature or extent of the Organizations' asserted statutory right, if any, to bargain; that determination is properly before the courts. The Board's inquiry is limited to a determination of whether the parties' written agreements or past practice (as alleged by the Carrier) entitled the Carrier, as it claims, unilaterally to abolish these positions in connection with the sale of one of its lines. As indicated more fully below, this Board unanimously finds that the Carrier was not empowered, either under the written agreements or alleged past practice, to do so.

It is undisputed by the Organizations that Carrier is not precluded, by agreement or otherwise, from *selling its assets* pursuant to ICC approval. However, the essential question, as far as this Board is concerned, is whether the *abolishment of existing positions* in connection with such sale was permissible, either by existing contract language or past practice clearly showing that the Organizations acquiesced to such abolishments and effectively waived their statutory right to negotiate the effects upon employees of such sale.

Resolution of this question, essentially, formed the basis of the Court's remand to binding arbitration after it determined that the Carrier's representations as to the existence of contract language and past practice were *prima facie* sufficient to allow a finding that this was a

"minor" dispute. The Organizations' correctly point out that the Court did not, and could not, interpret the agreements or evaluate the validity of the Carrier's claim other than to determine whether it was frivolous.

1. The initial inquiry to be made is whether the RIF or furlough provisions, expressly or by implication, can be construed in such a way as to warrant a conclusion that the Organizations intended to waive their statutory right to bargain for protection of employees affected by a line sale.

It is clear that there is nothing in the terms of these provisions (and the Carrier has not shown that the bargaining history indicated otherwise) that would in any way allow a conclusion that the parties intended or contemplated that the RIF or furlough provisions would apply to a line sale, or, more importantly, that by these provisions, the Organizations intended to waive their statutory right to bargain for employee protection as a consequence of such sale.

That the Carrier did not so intend is evidenced by the following colloquy between John Clarke, attorney for the Organizations, and Brenton Massie, Assistant Vice President-Labor Relations for CSXT (in transcript of *Decker* hearing, III at p. 72):

> Q. [by Clarke] . . . Do you have anything in your collective bargaining agreements that give you the right to sell this line without bargaining with the unions over the impact of this sale, as you just acknowledged would occur, on the employees?
>
> A. [by Massie] No, sir.

Contrary to Carrier's contention that the RIF or furlough provisions are so "broadly drawn" as to permit job abolishments for any reason, *including line sales*, this Board finds that such contention is not dispositive. Even assuming, *arguendo*, that the RIF or furlough provisions

were intended to include line sales, there is simply nothing in these provisions to indicate that the agreement negotiators contemplated, anticipated or intended that this language would apply to line sales in such a manner as to bar the filing of Section 6 Notices, thus depriving the Organizations of statutory recourse to the Railway Labor Act.

Thus, it is clear that there is nothing in these agreements which prohibits the sale of the Carrier's assets; the Carrier is free to do so, and the Organizations do not disagree. It is equally clear, however, that there is nothing in these agreements that waives the right of the Organizations to invoke their statutory rights to bargain over the effects of such sale on the employees they represent.

2. Having determined that there is no written language support for the Carrier's position, the next area of inquiry is the validity of the Carrier's assertion that its past practice of selling or abandoning lines without objection by the Organizations attained contractual status; and that such prior acquiescence by the Organizations permitted Carrier to sell the Buffalo-Eidenau Line without negotiating the effects of such sale on affected employees despite a filed Section 6 Notice.

As a general consideration, past practice and custom constitute an important factor in labor-management relations, and evidence of past practice and custom may be introduced for a number of purposes, including the establishment of an implied agreement not set forth in a written agreement.

In such instances, it is generally held that, in order to be binding, such past practice must be unequivocal; tactitly or mutually agreed upon; clearly enunciated and acted upon; and long standing as a fixed and established practice accepted by both sides without objection or repudiation.

Applying the above criteria to the instant dispute, this Board finds that the Carrier's asserted past practice did not attain binding contractual status precluding the Organizations from recourse to statutory rights under the Railway Labor Act.

It must be kept in mind that the critical matter under consideration is the availability of protective benefits to affected employees in the event of a sale or abandonment. The record reveals that up until 1982, the ICC imposed protective conditions for employees affected by the Carrier's sales or abandonments; and the Organizations, prior to 1982, had no reason to negotiate, litigate or otherwise protest as a means of achieving such protection.

In 1982, the ICC approved the Carrier's sale of 79 miles of line to the Knox & Kane Railroad, and for the first time, imposed no protective conditions. One of the Organizations, whose employes were affected, requested the ICC (without success) to revoke the exemption and provide some form of protection. It also filed a grievance.

Also in 1982 the Carrier sold approximately 10 miles of its line to the Historic Red Clay Valley. The ICC imposed no protective conditions. There was no protest by the Organizations because, as agreed to by the parties, no jobs were abolished.

In July 1986, the Carrier sold approximately 117 miles of its line to the Rochester & Southern Railway. The ICC imposed no protective conditions, and challenges were filed and attempts made to negotiate in connection with the sale regarding employee protection.

In March 1987, the Carrier sold approximately 53 miles of its line to the City of Jackson, Ohio. The ICC imposed no protective conditions, and challenges were filed or attempts were made to negotiate in connection with the sale regarding employee protection.

It is therefore clear, as the Organizations points out:

> In each of these sales [since 1982], either the ICC had imposed labor protective conditions or the Organizations had sought to obtain employee protections by challenging the ICC's actions or by seeking to negotiate such protections for affected employees.

It simply cannot be concluded, under the circumstances, that the Carrier's asserted past practice attained contractual status enabling the Carrier to sell the Buffalo-Eidenau Line without negotiating the effects of such a sale on affected employees. There is no basis for finding, in the record before this Board, that the Organizations relinquished their right to seek protection, by whatever means, for their affected members.

3. With respect to the Carrier's contentions that the April 1, 1988 Section 6 Notice filed by the Organizations is an admission that existing RIF and furlough provisions apply to line sales, this Board finds such contention to be without merit. As indicated earlier, there is nothing in the written agreements that gives Carrier the right to consummate a line sale without first bargaining under the Railway Labor Act. As the Organizations correctly point out, in order for such contention to have merit, "Carrier must identify a provision which effects a waiver of the Organizations' statutory right to bargain for protection for employees affected by the sale."

For the same reason, this Board is not persuaded by Carrier's arguments that the Organizations waived their rights to bargain because, in the past, protective provisions had been negotiated between Carrier and two of the Organizations or because two other Organizations sought to do the same. Neither circumstances warrants a finding that, expressly or by implication, the Organizations waived their right to bargain for protection in the event of a line sale.

* * * *

The Board has stated previously herein that the Carrier may sell a railroad line, but it has no support in Agreement or practice for the unilateral abolishment of positions as a result of such sale. These findings have an impact on all Organizations involved in this dispute. The Board, nevertheless, is compelled to address the claims made by two of the Organizations that specific rules in their Agreements bar the Carrier from abolishing jobs in connection with a line sale. These Organizations are the Brotherhood of Maintenance of Way Employes ("BMWE") and the Transportation•Communications International Union ("TCU").

BMWE Rule 11(b)

The BMWE contends that the Carrier violated its Agreement, specifically Rule 11(b) when it abolished twenty-four B&O-BMWE jobs.

Rule 11(b) reads as follows:

> There will be no reduction in the number of line gangs and yard gangs assigned on any subdivision except by mutual agreement between the parties. The Company's right to make minor changes in the territorial limits of line gangs or yard gangs is not abridged, but the Organization will be furnished an annual statement reflecting such changes. If, for any reason, the headquarters of a line gang or yard gang is moved from one location to another the employees assigned to such gang may exercise displacement rights within ten (10) calendar days after such change.

The BMWE contends that Rule 11(b) clearly states that there will be no reduction in the number of line gangs and yard gangs assigned on any subdivision, except by mutual agreement between the parties. It also argues that the issue of Carrier's unilateral abolishment of positions in yard and line gangs has been reviewed

by Public Law Board 3561. In Award Nos. 28 and 29, that Board, according to the BMWE, unequivocably stated that Carrier could not, for any reason, eliminate yard and line gangs without agreement of the Organization.

The Carrier argues that, despite Award Nos. 28 and 29 of PLB 3561, the Organization has not carried its burden in this instance. Rule 11(b) only applies if Carrier controls the maintenance work on the line. In the instant case, the line has been sold, and the Carrier no longer is responsible for the work.

The Carrier also contends that neither it nor the BMWE has ever considered Rule 11(b) to apply to elimination of yard or line gangs because of a line sale. It has never raised such an assertion in the past, when Carrier sold portions of its property and line and yard gangs were eliminated.

For reasons set forth below, this Board finds and concludes unanimously that CSXT, by its action in abolishing BMWE positions in connection with the Bulaffo-Eidenau Line sale, did not violate Rule 11(b) of the B&O-BMWE Agreement.

An analysis of this rule reveals that it was placed in the Agreement to give the Organizations some protection against reduction in force and dislocation of employees resulting from Carrier's reducing the number of gangs or changing the headquarters points of gangs. The rule was bargained to grant employees protection against loss of work in an environment of consolidation and changing territorial boundaries on the Baltimore and Ohio Railroad, not as protection against a line sale by Carrier.

The Board finds nothing in the rule which could be construed to mean that the parties intended or even remotely contemplated that Rule 11(b) could be raised as a bar to a line sale. In order for the rule to be applied as the Organizations propose, there must be some indica-

tion that the parties intended that it would have applicability in the event of job abolishments resulting from a line sale. We find no such intent in this record. Just as this Board rejected Carrier's position on the impact of the RIF and furlough clauses, so too is it compelled to reject the BMWE position on Rule 11(b).

Award Nos. 28 and 29 of Public Law Board 3651 are not applicable. Those Awards dealt with the reduction in force in yard and line gangs, changing of headquarter points of gangs, and elimination of all employees in a gang, except a foreman. Those conditions are all covered under Rule 11(b) nad Award Nos. 28 and 29 properly so indicated. None of those conditions is present in this instance.

TCU RULE 1(b)

The TCU contends that the Carrier does not have the right to remove work from under the scope of the C&O-TCU Agreement for any reason. It argues that Carrier can sell its property if it chooses, but it cannot abolish positions or remove work covered under the Agreement without the approval of the Organization.

The TCU relies on Rule 1(b) of the C&O-TCU Agreement to support its position. Rule 1(b) reads as follows:

> Positions or work within the scope of this Agreement belong to employees herein covered and nothing in this Agreement shall be construed to permit the removal of such positions or work from the application of these rules except as provided in Rule 66.
>
> Work covered by this scope rule which is incident to and directly attached to the primary duties of an employee not covered by this Agreement may be performed by such employee, provided the performance of such work does not involve the preponderance of the duties of such other employee. Nothing in this paragraph (b) will permit the abolishment of a

clerical position and the transfer of the work of that position to an employe not covered by this Agreement.

The Carrier contends that Rule 1(b) does not apply once the property has been sold and the positions abolished.

As concluded in conjunction with the RIF Rules and with BMWE Rule 11(b), the Board also unanimously finds that the TCU-C&O Scope Rules does not apply in this case. There is nothing in the record to persuade the Board that the Scope Rule can be used to prohibit a line sale by Carrier.

The application of Rule 1(b) to the abolishment of jobs resulting from a sale has no more validity than does Rule 11(b) of the B&O-BMWE Agreement or the RIF rules of the other Agreements involved. Nothing in this record supports the position that the parties ever intended that the Scope Rule would be applied as the Organizations suggest.

In the past, the Organizations relied on legislated employee protection, ICC-imposed protection, and specific employee protection agreements entered into by the parties to safeguard employees from the impact of a line sale. There is no showing that the TCU Scope Rule was intended to replace or serve as a substitute for such protective arrangements. In their absence, the Scope Rule cannot be raised to take their place.

In final consideration of this issue, the Board notes that all affected TCU employees have taken separation allowances, accepted work with the new Employer, or transferred to CSXT positions at other locations.

AWARD

The questions set before the Board are disposed of as provided in the Findings and Conclusions herein.

/s/ Rodney E. Dennis
RODNEY E. DENNIS
Neutral Member

/s/ Herbert L. Marx, Jr.
HERBERT L. MARX, JR.
Neutral Member

/s/ Nicholas H. Zumas
NICHOLAS H. ZUMAS
Neutral Member

DATED: December 15, 1988

APPENDIX H

STATUTES RELIED UPON:

I. Railway Labor Act, 45 U.S.C. 151, *et seq.* (Excerpts)

A. Section 2 First, 45 U.S.C. § 152 First

B. Section 2 Seventh, 45 U.S.C. § 152 Seventh

C. Sections 3 First(i), (m), (p) and (q), 45 U.S.C. §§ 153 First(i), (m), (p) and (q)

D. Section 3 Second, 45 U.S.C. § 153 Second

E. Section 5 First, 45 U.S.C. § 155 First

F. Section 6, 45 U.S.C. § 156

G. Section 7 First, 45 U.S.C. § 157 First

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B Section 2 Seventh

45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Sections 3 First(i), (m), (p) and (q)

45 U.S.C. § 153 First(i), (m), (p) and (q)

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or applica-

tion of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute.

In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

* * * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs

in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in the United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive

on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in section 1291 and 1254 of title 28, United States Code.

D. Section 3 Second

45 U.S.C. § 153 Second

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional board of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional boards of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or clas of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from

the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carried and by one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall elect an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board

designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

E. Section 5 First

45 U.S.C. § 155 First

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parteis in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such contro-

versy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

F. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board,

unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

G. Section 7 First

45 U.S.C. § 157 First

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in a manner provided in the preceeding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

APPENDIX I

LIST OF PETITIONERS

United Transportation Union [UTU], F.A. Hardin (President UTU), and J.A. Cianciotti (General Chairman, UTU (E));

UTU, Yardmasters Department [RYA], B.R. Carver (Assistant to President, RYA), and Richard P. DeGenova (General Chairman, UTU (RYA));

American Train Dispatchers Association [ATDA], R.J. Irvin (President, ATDA), and D.W. Branham (General Chairman, ATDA);

Brotherhood of Maintenance of Way Employes [BMWE], G.N. Zeh (President, BMWE), and B.J. Twigg (Executive Board, BMWE);

Transportation • Communications International Union [TCU] (formerly Brotherhood of Railway, Airline and Steamship Clerks [BRAC]), R.I. Kilroy (International President, TCU), Dwight D. Vance (General Chairman, C&O System Board, BRAC), and L.H. Tackett (General Chairman, B&O System Board, BRAC);

Brotherhood of Locomotive Engineers [BLE], L.D. McFather (President, BLE), and J.A. LeClair (General Chairman, B&O ~~Carmen~~); Committee

TCU, Carmen Division [Carmen], W. Fairchild (President, Carmen), and M.L. Crawford (General Chairman, B&O Carmen);

International Association of Machinists and Aerospace Workers [IAM], J.F. Peterpaul (Vice President, IAM), A.J. Sarcone (General Chairman, IAM District 22), and W.D. Snell (Assistant President/Directing General Chairman, IAM District 22);

International Brotherhood of Firemen and Oilers [IBF&O], J.L. Walker (International President, IBF&O), and D.S. Anderson (General Chairman, System Council No. 6, IBF&O);

Sheetmetal Workers International Association [SMWIA], A.R. Hicks (General Chairman, SMWIA), and D.C. Buchanan (Dir. Railroad Workers, SMWIA);

International Brotherhood of Electrical Workers [IBEW], E.P. McEntee (International Vice President, IBEW), and George L. Laitile (General Chairman, IBEW); and

Brotherhood of Railroad Signalmen [BRS], V.M. Speakman, Jr. (President, BRS), and C.T. Green (General Chairman, B&O System Committee, BRS).

No. 89-565

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED TRANSPORTATION UNION, et al.,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT CSX TRANSPORTATION, INC.'S BRIEF IN OPPOSITION

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November 22, 1989

QUESTION PRESENTED

1. Did the Second Circuit properly classify as a minor dispute within the meaning of the Railway Labor Act a disagreement between a railroad and its unions whether the railroad's collective bargaining agreements and past practices permitted the abolishment of positions no longer needed after the sale of a line of railroad?

2. Do the Federal District Courts exercise dual jurisdiction with Adjustment Boards over minor disputes?

RULE 28.1 LIST

Respondent CSX Transportation, Inc. is a wholly-owned subsidiary of CSX Corporation.

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RESPONDENT CSX TRANSPORTATION, INC.'S BRIEF IN OPPOSITION

Respondent CSX Transportation, Inc. ("CSXT") respectfully requests that this Court deny the petition for writ of certiorari submitted by the United Transportation Union, *et al.* (hereinafter "unions"), seeking review of the Second Circuit's decision reported at 879 F.2d 990 (2d Cir. 1989) (hereinafter cited as *"CSXT v. UTU"*).[1] The Second Circuit's

[1] The petition was filed on behalf of eleven unions and twenty-six union officials. Pet. at 1 & Appendix I thereto. The petition notes that one sub-unit of a petitioning union reached a settlement agreement with CSXT. *Id.* at n.1. In fact, CSXT has reached agreements with four of the petitioning unions and their sub-units,

decision was fully consistent with *Consolidated Rail Corp. v. RLEA*, 109 S.Ct. 2477 (1989) (hereinafter "*Conrail*") and provides no basis for review by this Court of a subject so recently treated in *Conrail*, *i.e.*, application of the standard for a minor dispute within the meaning of the Railway Labor Act.

COUNTERSTATEMENT OF THE CASE

District Court Proceedings

This case arises out of the abolishment of positions and furlough of employees associated with the sale by CSXT of a marginal line of railroad between Buffalo, New York and Eidenau, Pennsylvania (hereinafter "Buffalo-Eidenau Line") to a new shortline railroad, which had agreed to offer employment to CSXT employees who worked on the line. App. 42a.[2] One of CSXT's unions initially tried to block the sale by obtaining an ex parte restraining order in state court. The union argued that implementation of the sale without prior bargaining raised a major dispute within the meaning of the Railway Labor Act ("RLA"), because the union had served a bargaining proposal under Section 6 of the RLA, 45 U.S.C. § 156 (a so-called Section 6 notice), seeking to bargain over the sale. The union claimed CSXT was required by the RLA's status quo requirement to continue operating the Buffalo-Eidenau Line until the RLA's bargaining processes

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as explained *infra* at 20. These unions are the United Transportation Union ("UTU"); UTU(E); UTU, Yardmasters Department; and Brotherhood of Locomotive Engineers.

[2] As of the District Court's decision, 113 CSXT employees had accepted employment with the purchaser. App. 42a n.6.

had been exhausted. CSXT removed the case to Federal District Court in *Decker v. CSXT*, 672 F. Supp. 674 (W.D.N.Y. 1987). CSXT there contended that the parties' disagreement presented, at most, a minor dispute within the meaning of the RLA.[3] There is no requirement to maintain the status quo in a minor dispute. Alternatively, CSXT contended that the RLA's bargaining and status quo requirements were superceded by the Interstate Commerce Commission's ("ICC") exclusive jurisdiction over the sale under Section 10901 of the Interstate Commerce Act, 49 U.S.C. § 10901. The District Court initially dismissed the unions' complaint on the basis of the ICC's jurisdiction and did not reach any RLA issue.

Several of CSXT's unions then threatened to strike CSXT if it went forward with the sale. CSXT brought its own action in the Western District of New York to enjoin the threatened strike. The unions counter-claimed that the sale violated the RLA's bargaining and status quo requirements. The unions also sought reconsideration of *Decker v. CSXT* in light of the then intervening decision by the Third Circuit in *RLEA v. Pittsburgh & L.E.R.R.*, 845 F.2d 420 (3d Cir. 1988), *rev'd*, 109 S.Ct. 2584 (1989) (hereinafter "*P&LE*").

Based on the Third Circuit's *P&LE* decision, the District Court reversed its *Decker v. CSXT* holding. App. 50a-52a. The District Court then proceeded to consider the

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[3] A major dispute is a disagreement arising out of the change or formation of a collective bargaining agreement and involves the acquisition of rights for the future. A minor dispute is a disagreement over the meaning or application of rights in existing collective bargaining agreements or past practices and is subject to compulsory and binding arbitration. *See generally, e.g., Conrail*, 109 S. Ct. at 2479-81.

parties' RLA arguments. The unions argued the sale would "change" rights in collective bargaining agreements without first complying with the RLA's major dispute procedures for amending agreements, in violation of Section 2, Seventh of the RLA, 45 U.S.C. § 152, Seventh. Although not disclosed by their petition to this Court, the unions also argued that abolishment of positions as a result of the sale would violate certain of their agreements with CSXT. They further argued that their Section 6 notices invoked the RLA's status quo requirement, which they asserted precluded the sale. CSXT took the position that the sale did not violate or change agreements and that CSXT did not have to bargain prior to abolishing positions no longer needed after the sale, because the parties' agreements already addressed the effects of job abolishment and reductions-in-force on employees. These agreements recognized CSXT's right unilaterally to reduce forces when necessary, subject only to the requirements that furloughs be in reverse seniority order and that a specified notice (generally 5 or 10 days) be posted prior to a job abolishment. App. 57a.[4] The agreements also provided that an employee whose position was abolished could exercise his or her seniority to bid on other positions. If no positions were available, the employee was placed on furlough status, subject to recall. CSXT's unions had prior opportunities to bargain for monetary and other compensation for employees whose jobs were abolished, including as a result of line sales, and certain of CSXT's agreements already provided for wage guarantees, severance payments or other benefits for employees affected by job abolishment. App. 43a.- 44a.

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[4] A typical provision stated that "[w]hen it becomes necessary to reduce expenses, the forces at any point or in any department or subdivision thereof shall be reduced ...." App. 57a.

These protections ranged in duration from five years to wage protection for the employee's working life. Moreover, the Buffalo-Eidenau sale was hardly CSXT's first disposition of a rail line. CSXT, and a predecessor, the Baltimore and Ohio Railroad ("B&O)", had a past practice of disposing of marginal or unprofitable lines of the former B&O system, through sale or abandonment, without objection by the unions that their disposition violated employees' rights under collective bargaining agreements or the RLA. App. 58a - 59a. This practice included the sale over the past ten years of ten marginal line segments, as an alternative to their eventual abandonment. Because the parties' disagreement required the interpretation of these agreements and practices under them, it was a minor dispute.[5]

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[5] CSXT also argued that the unions' initial Section 6 notices (served in 1987 and early 1988) were precluded by moratorium provisions in the parties' collective bargaining agreements, which barred the service of Section 6 notices before April 1, 1988. A dispute over the moratoria's applicability was itself a minor dispute, which had to be resolved before there was any bargaining obligation. *See, e.g., St. Louis S.W. Ry. v. United Transportation Union*, 646 F.2d 230, 233 (5th Cir. 1981) ("it is clear under existing law that the possible preclusion of the union's caboose proposal by the moratorium provision created a 'minor' dispute . . . ."). Although the District Court found CSXT's argument had merit, it concluded that the moratorium issue became moot when the unions served new Section 6 notices after the moratoria's expiration. App. 54a n.10. Those Section 6 notices were served well after the litigation had commenced and after CSXT had entered an agreement to sell the Line.

After careful consideration,[6] the District Court held that CSXT had presented a non-frivolous argument that its written agreements and past practices arguably justified the unilateral abolishment of unneeded positions. Therefore, the parties' disagreement was a minor dispute. The Court directed that the dispute be submitted to arbitration in accordance with the RLA's minor dispute resolution procedures and enjoined the unions from striking over the minor dispute.[7] The District Court rejected the unions' request for an injunction of the sale pending arbitration. App. 69a.

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[6] The District Court held four days of hearings, heard eight witnesses, and received nearly 100 exhibits. App. 43a. The District Court's behavior certainly does not justify the unions' feckless claim that district courts classify disputes as minor simply to lighten their case loads. Pet. at 11. Moreover, an inclination to classify disputes as minor is not "a misdirected predisposition . . . to prevent strikes." The very purpose of the minor dispute procedures is to resolve disagreements peacefully without labor strife. Thus, this and the appellate courts have recognized that doubts are to be resolved in favor of a minor dispute holding. *See, e.g., Conrail*, 109 S. Ct. at 2484 ("Full utilization of the Board's procedures also will diminish the risk of interruptions in commerce."); *Brotherhood of Locomotive Engineers v. Atchison, T. & S.F. Ry.*, 768 F.2d 914, 920 (7th Cir. 1985) (in close cases minor dispute classification favored to avoid strikes).

[7] Alternatively, CSXT argued that, even if the dispute were classified as a major dispute, the status quo included CSXT's right to sell lines of railroad and abolish unneeded positions. Because of the District Court's resolution of the case, it never reached CSXT's alternative argument that the sale and abolishment of positions would not violate the status quo.

The unions then appealed the District Court's minor dispute holding to the Second Circuit, but did not appeal the District Court's refusal to enter an injunction pending arbitration. CSXT did not appeal the District Court's holding that the ICC's jurisdiction under Section 10901 of the Interstate Commerce Act did not supplant application of the RLA to this line sale. Thus, the narrow issue presented to the Second Circuit was whether the District Court correctly classified the parties' disagreement as a minor dispute.

Arbitration Proceedings

Before the Second Circuit issued its opinion, the parties, by agreement, submitted their dispute to expedited arbitration before a Special Board of Adjustment, *i.e.*, an arbitration panel, established pursuant to Section 3, Second of the RLA, 45 U.S.C. § 153, Second.[8] The unions claimed that two of their agreements were violated by the unilateral implementation of the sale, but that their agreements otherwise did not address line sales, either to permit or prohibit them. App. 87a. CSXT contended that the broadly worded force reduction provisions in its labor agreements applied to any job abolishment, including those resulting from sales of lines of railroad. The Adjustment Board concluded that CSXT had the right to sell rail lines and that the sale did not violate any collective bargaining agreement. App. 90a, 93a. The Board, however, also concluded that the force reduction provisions could not be applied in a manner that

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[8] Exclusive jurisdiction over minor disputes is in the National Railroad Adjustment Board or an arbitration panel voluntarily agreed to by the carrier and unions. *See, e.g., Conrail*, 109 S. Ct. at 2480-81.

waived the unions' supposed statutory right to bargain over job abolishments prior to the sale's implementation. App. 90a. The Board did not base this conclusion upon any agreement language or past practice, which it found "not dispositive", App. 89a, but on its view that the RLA statutorily required CSXT to bargain over the effects of job abolishment prior to the sale of the rail line. CSXT has appealed the arbitration award, pursuant to 45 U.S.C. § 153, First(q), because the Board's conclusion was based, not upon the collective bargaining agreements, but upon the Board's erroneous interpretation of the RLA's bargaining and status quo requirements. *CSXT v. UTU*, No. 88-1404C (W.D.N.Y. argued June 30, 1989).[9] No decision has yet been issued by the District Court.

Appellate Proceedings

In a post-argument motion, the unions argued to the Second Circuit that, because the arbitration panel had decided the force reduction provisions did not apply to job abolishments resulting from the Buffalo-Eidenau Line sale, the dispute was now a major dispute and the Court of Appeals should summarily vacate the strike injunction and remand the case to the District Court to determine that CSXT had violated the RLA's status quo requirement and Section 2,

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[9] Arbitrators do not have jurisdiction to interpret and apply statutory requirements. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (arbitrators interpret law of the shop, not law of the land); *Baltimore & O.R.R. v. Brotherhood of Ry., Airline & Steamship Clerks*, 108 (CCH) Lab. Cas. ¶ 10,261 (4th Cir. 1987), *cert. denied, sub. nom Transportation Communications Union v. Baltimore & O.R.R.*, 464 U.S. 1008 (1988) (arbitrator's award must be based on contract language).

Seventh of the RLA by implementing the sale. The unions also argued that, because the Adjustment Board rejected CSXT's contract interpretation, they were free to strike.

The Second Circuit held that the District Court correctly applied the major/minor dispute analysis and properly found the dispute to be minor. The Court then held that the arbitration award had no bearing on the major/minor dispute classification, because, unlike the Adjustment Board, the District Court's role was not to determine whose contract interpretation was correct, but merely whether those interpretations were non-frivolous. Finally, the Second Circuit ruled, following this Court's decision in *Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30 (1957), that strikes over minor disputes were prohibited and that the unions' exclusive remedy lay with the Adjustment Board or judicial review of the Board's award.

The unions sought rehearing and rehearing en banc, contending that the subsequently issued decision in *Consolidated Rail Corp. v. RLEA*, 109 S. Ct. 2477 (1989) should be interpreted to mean that, if an arbitrator rejects a carrier's interpretation of its rights under existing agreements, the minor dispute is converted into a major dispute. No judge on the Second Circuit voted to rehear the case, and the unions' petition was denied. App. 73a.

REASONS WHY THE PETITION SHOULD BE DENIED

The unions argue that Supreme Court review is warranted for two reasons. First, they contend the Second Circuit's decision is in conflict with this Court's *Conrail* opinion. Second, they claim the case presents an issue of

great importance to the railroad industry, because the Second Circuit's decision somehow precludes unions from ever bargaining over the effects of sales of rail lines. Neither claim is true, and there is no basis for Supreme Court review.

The Second Circuit's decision was fully consistent with *Conrail*. The issue before this Court in *Conrail* was the standard for classifying disputes as major or minor. The Second Circuit applied the same minor dispute standard that was adopted in *Conrail*, and the unions do not claim otherwise. The unions try to manufacture a conflict between the Second Circuit and this Court by mischaracterizing the holdings of both. The Second Circuit's holding that a dispute, once classified minor, remains subject to the RLA's minor dispute procedures did not, as the unions claim, require them to look to arbitrators to remedy statutory violations of the RLA's status quo and bargaining requirements. Those requirements, by definition, do not arise in minor disputes. Moreover, the unions' argument that a minor dispute converts into a major dispute is fundamentally at odds with the statute, which establishes separate, distinct, and mutually exclusive dispute resolution procedures for the two kinds of disputes.

The Second Circuit's decision also did not preclude unions from bargaining over the effects of line sales. The Second Circuit did not hold that such effects were not a bargainable subject. CSXT has not refused to bargain with the unions and has, in fact, reached agreements with four of the petitioning unions covering the effects on employees of the Buffalo-Eidenau Line sale.

Because this case presented nothing more than a straightforward application of the same minor dispute standard

approved in *Conrail*, there is no basis for Supreme Court review, and the petition should be denied.

I. The Second Circuit's Minor Dispute Decision Was Fully Consistent With This Court's Conrail Decision

Contrary to the unions' argument, the "very issue" decided by this Court in *Conrail* was not that a minor dispute converts into a major dispute if the arbitrator rules in favor of the unions. Pet. at 9. The issue in *Conrail* was to "articulate a standard for differentiating between [major and minor disputes] and apply that standard . . ." to the facts of that case. 109 S.Ct. at 2479. The Court adopted as its standard essentially the same standard which had been utilized previously by the various appellate courts, including the Second Circuit. This Court stated that standard as follows: "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 2482-83. The test applied here by the Second Circuit and District Court was substantially the same formulation as the *Conrail* standard. For example, the Second Circuit stated that "[a] dispute will be considered minor, on the other hand, if the contract is 'reasonably susceptible' to the carrier's interpretation." App. 15a.

The Second Circuit's application of this standard to the particular facts before it also does not present an issue for Supreme Court review. While this Court considered the issue of the appropriate standard for a minor dispute in *Conrail*, that was because this Court had never before passed on the appropriate minor dispute test and the Third Circuit had departed from the minor dispute standard previously utilized

by it and other circuits, and approved in *Conrail*, by improperly adding a "meeting of the minds" requirement where the carrier relied solely on past practices to justify its actions. 109 S.Ct. at 2488. In addition, there was a split in the circuits which had considered similar facts whether drug testing disputes were major or minor. 109 S.Ct. at 2479. Now that this Court has spoken on the minor dispute standard, there is no need for it to review every application of that standard by the lower courts. Moreover, the other factors present in *Conrail* were not in this case. There is no claim here that the Second Circuit applied a different standard than that adopted in *Conrail*. There is no split in the Circuits on whether a carrier's reliance on force reduction provisions and past practices to abolish positions upon the sale of a rail line presents a minor dispute.[10] Indeed, every court to reach this question

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[10] The unions' argument, deservedly buried in a footnote, Pet. at 9-10 n.9, that the Second Circuit's classification of this dispute as minor was inconsistent with this Court's opinions in *P&LE* and *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142 (1969) (hereinafter "*Shore Line*") is also baseless. As this Court recognized in *Conrail*, "[t]o an extent . . . the distinction between major and minor disputes is a matter of pleading." 109 S.Ct. at 2482. In *P&LE*, neither the carrier nor the unions alleged a minor dispute. The carrier, which was going completely out of business as a railroad, did not rely on its written agreements or past practice for its right to do so. Indeed, this Court noted the collective bargaining agreements were not in the record. 109 S.Ct. at 2593 n.14. The Third Circuit had also recognized no minor dispute issues were present there. 845 F.2d at 428 n.9. Likewise, *Shore Line* did not involve any minor dispute issues. The carrier there did not rely on written agreements or past practice to justify its unilateral change in crew reporting points. 396 U.S. at 154. In *Shore Line*, the Court described the RLA's status quo requirements. Those requirements, and their statutory bases (45 U.S.C. §§ 155,

has classified the dispute as minor. The Seventh Circuit held on very similar facts that a railroad's sale of rail lines and abolishment of positions raised a minor dispute. This Court twice refused to review that minor dispute holding. *Chicago & N.W. Transportation Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988), *reh'g denied*, 109 S. Ct. 885 (1989). In *Conrail*, 109 S. Ct. at 2482, this Court favorably cited *Maine Central R.R. v. United Transportation Union*, 787 F.2d 780 (1st Cir.), *cert. denied*, 107 S. Ct. 169 (1986), which similarly held that a carrier's lease of a rail line presented a minor dispute. *Accord General Committee of Adjustment v. CSX R.R.*, Civ. No. 87-1712 (M.D. Pa. Feb. 24, 1989) (line sale presented minor dispute), *appeal pend'g*, No. 89-5246 (3rd Cir. argued Oct. 23, 1989); *Atchison T. & S.F. Ry. v. RLEA*, No. 87-C-9847, 1988 WL 116502 (N.D. Ill. 1988), *appeal dismissed*, No. 89-1468 (7th Cir. Aug. 3, 1989) (line sale presented minor dispute).

Thus, the Second Circuit's minor dispute holding was fully consistent with *Conrail*.

156, 160), do not, however, apply in minor disputes, as this Court recognized in *Conrail*. 109 S.Ct. at 2481. Finally, there is no conflict between *Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963) and *Chicago & N.W. Transportation Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S.Ct. 493 (1988). Both decisions held that a disagreement over the carrier's right unilaterally to abolish unneeded positions presented a minor dispute.

II. The Second Circuit's Holding That the Dispute Over CSXT's Abolishment of Positions Remained a Minor Dispute Did Not Conflict With Conrail

The Second Circuit's further holding, that the dispute whether the abolishment of jobs was authorized by or violated any agreements remained a minor dispute after the arbitrators' ruling, was also completely consistent with *Conrail*. Contrary to the unions' erroneous characterization, this Second Circuit holding did not "Requir[e] Petitioners To Look To The Adjustment Boards For Relief From CSXT's Violations Of The Railway Labor Act's Bargaining And Status Quo Commands . . . In Direct Conflict With . . . *Conrail*". Pet. at 13. Petitioners' argument ignores the fact that the RLA's "bargaining and status quo commands" do not arise in minor disputes. For example, this Court recognized in *Conrail* that, in a minor dispute, "this Court never has recognized a general statutory obligation on the part of an employer to maintain the status quo pending the Board's decision."[11] *Accord CSXT v. UTU*, App. 14a. The unions' related argument, Pet. at 15, that CSXT's continued operation of the Buffalo-Eidenau Line had become "part of the actual, objective working conditions of the employees," which conditions were frozen by the RLA's status quo obligation when the unions served their Section 6 notices, is similarly misplaced. The mere service of Section 6 notices did not transform the dispute into a major dispute.

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[11] This Court recognized that, in certain limited circumstances, a District Court could condition a strike injunction upon the carrier's maintenance of the status quo pending arbitration proceedings. 109 S. Ct. at 2481. Here, the unions did not appeal the District Court's refusal to so condition its injunction. The Second Circuit was unaware the unions had sought such a condition, because its denial was not appealed. App. 29a n.10.

Conrail, 109 S. Ct. at 2482 (courts are not bound by parties' characterization of the dispute); *accord*, *CSXT v. UTU*, App. 20a - 21a. Moreover, because the status quo requirement does not apply in a minor dispute, there was no basis for the District Court to define working conditions embraced by the status quo to include continued operation of the line by CSXT. In that regard, the unions' claim that the District Court found that the sale changed working conditions is equally erroneous. Pet. at 14-15. Because the District Court classified the dispute as minor, it made no determination whether working conditions were changed or violated. App. 27a n.9. Although not an issue in this case, the unions' definition of the status quo is also erroneous. This Court in *P&LE* rejected the same argument that the mere fact that a railroad has operated a rail line makes the carrier's continued operation of that line a working condition. 109 S. Ct. at 2593 ("state of being employed" is not a working condition) and 2594 ("there was no reason to expect, simply from the railroad's long existence, that it would stay in business . . . .").

Similarly, the unions' argument that the sale "changed" employees' contractual rights, in violation of RLA Section 2, Seventh and that adjustment boards cannot remedy violations of Section 2, Seventh is a complete red herring, because Section 2, Seventh applies only to a major dispute, not to a minor dispute. For example, this Court explained in *Conrail* that "[t]he statutory bases for the *major* dispute category are *§ 2, Seventh* and § 6 of the RLA . . . . [i]n contrast, the minor dispute category is predicated on § 2, Sixth and § 3, First(i) of the RLA . . . ." 109 S. Ct. at 2480 (emphasis added). Thus, because the RLA's status quo and bargaining requirements do not arise in minor disputes, the Second Circuit could not possibly be asking the Adjustment Board to determine whether CSXT had violated those statutory requirements. As the

Second Circuit noted, App. 30a, this same union claim that an adjustment board cannot provide a remedy, because no contractual right was violated, was the basis for the unions' unsuccessful attempt to obtain rehearing by this Court of denial of certiorari in *Chicago & N.W. Transportation Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988), *reh'g denied*, 109 S. Ct. 885 (1989).

Language selected by the unions from the Court's opinion and Justice White's concurrence in *Conrail* does not support their argument that *Conrail* held that a minor dispute over a carrier's right to act converted into a major dispute if the carrier later were found by an arbitrator not to have a contractual justification for its action. This Court in *Conrail* stated that the "onset" of the bargaining (*i.e.*, major dispute) process could be delayed "until the Board determines on the merits that the employer's interpretation of the agreement is incorrect . . . ." 109 S. Ct. at 2484. The unions are here trying to blur the distinction between two different disputes and merge them into one subject to the RLA's major dispute procedure. One dispute was the parties' disagreement whether CSXT could unilaterally abolish positions after a line sale. That dispute required the interpretation of existing agreements and was a minor dispute. The other dispute was the unions' efforts to obtain new rights admittedly not contained in existing agreements addressing the effects of the Buffalo-Eidenau line sale. That dispute, involving future rights, is a major dispute. *Conrail* cannot be fairly read to mean that the former minor dispute became subject to the RLA's major dispute procedures when the arbitrators disagreed with CSXT's interpretation of the force reduction provisions. Such a reading ignores the fact, long recognized by this Court, that the statute establishes two, separate and distinct, and mutually exclusive procedures, for resolving major and minor disputes.

See, e.g., Conrail, 109 S. Ct. at 2480 (*citing Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945) (" Congress has drawn major lines of difference between the two classes of controversy")).

The unions' argument is really nothing more than a re-working of their "hybrid" dispute argument already rejected by this Court in *Conrail*. There, these same rail unions argued that they could maintain a district court action and obtain a status quo injunction against unilateral carrier action until the carrier demonstrated in arbitration proceedings that its view of its rights under collective bargaining agreements and/or past practices was correct. 109 S.Ct. at 2483. Here, the unions are again arguing dual jurisdiction over a minor dispute "between federal court and adjustment board . . . as not being mutually exclusive . . ." Pet. at 17. Only this time, they argue the district court can find that the carrier violated the status quo after, rather than before, the arbitration if the carrier's contract interpretation is not upheld in arbitration.

Under the unions' logic, if an arbitrator were later to find that Conrail's drug testing procedures were not authorized by past practices, then a district court could find Conrail's implementation of drug testing violated Section 2, Seventh of the RLA, even though Section 2, Seventh did not apply at the time the testing was implemented. Such a result makes no sense and would have the same effect disapproved by *Conrail* of "requiring employers rigidly to maintain the status quo pending arbitration of their right to be flexible." *Id.* at 2483. Otherwise, if the carrier acted on its contract interpretation during arbitration, it runs the risk of being found after the fact to have violated the statute or to be subject to a strike. While the unions have down-played this latter aspect of their argument before this Court, the Second Circuit clearly

understood the import of their argument, stating that "the obvious implication of Appellants' application to vacate the District Court's anti-strike injunction is that, having prevailed before the Board, Appellants are now entitled to strike." App. 28a. However, the unions' position is completely at odds with the statute's requirement, as applied by this Court, that minor disputes be resolved peacefully. *Conrail*, 109 S. Ct. at 2481 ("Courts may enjoin strikes arising out of minor disputes."). *See also, e.g., Brotherhood of Locomotive Engineers v. Louisville & N.R.R.*, 373 U.S. 33, 40 (1963) (a union cannot strike over an Adjustment Board award).

Thus, the Second Circuit's decision that the dispute remained minor and the unions' remedies were limited to those provided by the RLA's minor dispute procedures, including judicial review of the arbitration award, was fully consistent with the RLA and this Court's decision in *Conrail*. The Second Circuit's holding was also consistent with this Court's long-standing precedents that the RLA's minor dispute procedures are "a mandatory, exclusive and comprehensive system," *Brotherhood of Locomotive Engineers v. Louisville & N.R.R.*, 373 U.S. at 38; adjustment boards have exclusive jurisdiction over minor disputes, *Conrail*, 109 S. Ct. at 2481; and that, under the statute, 45 U.S.C. § 153, First (p), (q), the role of the district court in minor disputes is limited to reviewing or enforcing arbitration awards, and the scope of

that role is exceedingly narrow,[12] *Conrail*, 109 S. Ct. at 2481; *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 325 (1972).

The unions' reliance on *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567-68 (1946), for their theory that district courts and adjustment boards can share jurisdiction over a minor dispute is also completely misplaced. Pet. at 17-18. First, the district court there was exercising jurisdiction under the bankruptcy laws as overseer of a bankrupt railroad. *See Brotherhood of Locomotive Engineers v. Missouri K.T.R.R.*, 363 U.S. 528, 533 (1960) ("In *Pitney*, we held that the District Court in exercise of its equity powers ancillary to its jurisdiction as railroad reorganization court under 11 U.S.C. § 205, should not have granted a permanent injunction . . . ."). Second, because *Pitney* found the underlying dispute to be minor, the district court was not adjudicating a violation of RLA Section 2, Seventh, which does not even arise in a minor dispute. *Pitney* did recognize that the RLA vests exclusive jurisdiction over minor disputes in adjustment boards and "intended to leave a minimum responsibility to the courts." *Id.* at 565-66. Thus, *Pitney* does not support the unions' effort

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[12] In 1966, Congress amended the RLA's provisions relating to judicial review or enforcement of adjustment board awards. Congress made clear its intention that judicial involvement in minor disputes be limited, by providing a very narrow standard of review. S. Rep. No. 89 - 1201, 89th Cong., 2d Sess. 2-3 (1966). Contrary to this intent, the unions would greatly expand judicial involvement in minor disputes by arguing that a court may convert a minor dispute into a major dispute following arbitration.

to enlarge court jurisdiction by converting a minor dispute into a major dispute.[13]

III. This Case Does Not Present an Issue of National Importance

The unions also argue that Supreme Court review is necessary, because the Second Circuit's decision allegedly frustrates the ability of unions to bargain over sales of lines of railroad and this raises an issue of national importance. Pet. at 13. The unions broadly assert that the Second Circuit "has given CSXT and other railroads a strong incentive to refuse to negotiate a solution to the line sale dispute." Nothing in the Second Circuit's opinion supports this sweeping and unsupported claim. Certainly, the Second Circuit did not hold that as a general proposition unions can never bargain over line sales or their effect on employees. Moreover, the Second

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[13] The unions take *Pitney's* statement that the district court should stay any action until after arbitration, 326 U.S. at 567-68, out of context. The Court made that statement by way of criticism of the district court, which had interpreted a railroad labor agreement rather than remand that question to an arbitrator. Thus, *Pitney* cannot be read to create jurisdiction in district courts over minor disputes, pursuant to Section 2, Seventh of the RLA. Such a reading needlessly brings *Pitney* into conflict with the statute and *Conrail*, which rejected dual jurisdiction in the courts and arbitrators over minor disputes. This Court has interpreted *Pitney* to mean that district courts should not exercise jurisdiction over minor disputes. *See, e.g., Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239, 243-44 (1950). Any action taken by the district court in *Pitney* after the arbitration would have been pursuant to 45 U.S.C. § 153, First (p) or (q), not 45 U.S.C. § 152, Seventh, to enforce or review the arbitration award.

Circuit's statement that CSXT had no bargaining obligation over the unions' Section 6 notices targeted to the Buffalo-Eidenau line sale was consistent with *Conrail's* statement that the "onset" of the bargaining process could be delayed pending arbitration of contract interpretation disputes. In fact, there was no delay here, because CSXT bargained over the effects of this sale and has reached agreements with the four unions which represent most of the employees who did not already have some form of monetary protection under existing collective bargaining agreements in the event their jobs were displaced by a line sale.[14] These agreements settled both the unions' Section 6 notices as well as litigation between the parties arising from the sale.

In addition, rail unions have served general Section 6 notices covering many subjects, including line sales, on the nation's major railroads. The unions are currently in bargaining with the bargaining agent for those railroads participating in multi-employer bargaining over these notices. Thus, the Second Circuit's ruling has not barred the unions'

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[14] Most of the employees in the non-operating crafts affected by the sale already were eligible for monetary benefits under existing agreements. App. 43a. The unions with whom CSXT has reached agreements mainly represent employees in the operating crafts, where existing agreements contain few furlough benefits.

efforts to address line sale issues through bargaining.[15] The "national importance" argument therefore provides no basis for Supreme Court review.

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[15] Disagreements may arise whether any and all topics over which unions seek to bargain relating to line sales may be a mandatory or permissive subject of bargaining. For example, this Court held in the *P&LE* case that an employer did not have to bargain over union proposals which would require the line sale agreement to be re-negotiated. 109 S. Ct. at 2597. However, issues relating to the scope and nature of any bargaining obligation did not arise in the lower courts here and provide no basis for Supreme Court review. *Cf. RLEA v. Boston & Maine Corp.*, 664 F. Supp. 605, 616-17 (D. Me. 1987) (disagreement whether an item in a Section 6 notice presents a mandatory or permissive bargaining subject not justiciable until a party seeks to exercise self-help to force agreement).

CONCLUSION

For the reasons set forth, the petition for writ of certiorari should be denied.

Respectfully submitted,

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November 22, 1989

No. 89-565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED TRANSPORTATION UNION, *et al.*,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

On November 22, 1989, respondent CSX Transportation, Inc. [hereinafter, "CSXT"] served a brief in opposition to the petition which rail labor had filed with this Court seeking a writ of certiorari to the United States Court of Appeals for the Second Circuit for review of that court's decision in *CSXT v. UTU*, 879 F.2d 990 (2d Cir. 1989). This reply brief is respectfully submitted by petitioners in response to several arguments raised by respondent CSXT; this brief is also submitted to bring to this Court's attention the recent decision by the Eighth Circuit in *Railway Labor Executives' Assoc. v. Chicago & North Western Transportation Co.* [here-

inafter, "*RLEA v. C&NW*"], 8th Cir. No. 87-5071, decided November 29, 1989, which decided the same classification issue as did the Second Circuit in *CSXT*, but reached a result that is in direct conflict with the Second Circuit's decision. Petitioners have reproduced the Eighth Circuit's decision as Appendix J to this Reply Brief.

I. CONTRARY TO RESPONDENT CSXT'S ARGUMENT, THIS CASE PRESENTS ISSUES WHICH ARE OF NATIONAL IMPORTANCE

After distorting this Court's decision in *Consolidated Rail Corp. v. Railway Labor Executives' Assoc.* [hereinafter, "*Conrail*"], 491 U.S. ——— (1989) beyond recognition, and ignoring Justice White's concurrence in that case, respondent concludes its opposition to this petition by arguing that the Second Circuit's decision in this case has not "frustrated" the ability of rail labor to bargain for employee protective agreements in line sale cases. CSXT Brief at 20-22. To support that assertion, respondent claims it has reached agreements with four unions which represent most of the employees who did not already have some form of monetary protection under existing collective bargaining agreements and that it has bargained with the other unions over their requests, both in this case and nationally, to devise protective agreements. CSXT Brief at 21. While partially true,[1] those assertions are misleading and totally ignore the fact that

[1] In May 1989, agreements were reached with four committees representing CSXT employees represented by two unions, but there was a dispute over whether the international unions had authorized those agreements. Consequently, only one committee and its General Chairman (Mr. R.W. Earley) were deleted as petitioners when this petition was filed. *See*, Petition at 1 n.1. Also, although several of the crafts, which have not reached agreements, have prior agreements with CSXT's predecessors that provide a form of "job security" to some of the affected employees, many of the employees represented by those craft unions are not covered by these agreements. *E.g.*, Appendix To Petition [hereinafter, "App."] at 43a-44a n.7.

the Second Circuit's decision has *eliminated* rail labor's bargaining leverage in this case.

This Court has recognized in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 150 (1969), that the Railway Labor Act's status quo obligation is "central" to the design of that Act. Indeed, rail labor respectfully submits, it is the status quo obligation, and the bargaining leverage which *it alone* gives to the party opposing the proposed change, that is the true strength of the Railway Labor Act. As this Court explained in *Detroit & Toledo*, 396 U.S. at 150 (emphasis added):

> [S]ince disputes usually arise when one party wants to change the status quo without undue delay, *the power which the Act gives the other party to preserve the status quo for a prolonged period* will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

In this case, respondent CSXT relied upon what has since been determined to be an improper interpretation of its *contractual* rights, to justify its alteration of the status quo by selling its rail line without first bargaining. That sale has deprived rail labor of its primary bargaining leverage, and unless the district court is permitted to enforce the status quo obligation *retroactively*, rail labor must rely solely upon its right to strike to give it any bargaining leverage. However, the Second Circuit's decision takes that right away as well. In short, the Second Circuit's decision deprives rail labor of all of its bargaining leverage to resolve the disputes which the Section 6 notices have raised in this case.

Additionally, the Second Circuit's conclusion that the adjustment board procedures are rail labor's *exclusive* remedy in this case, and its ruling that the district court's bargaining order is "presumably moot at this juncture" (App. at 22a), effectively eliminate rail labor's statutory right to ask the National Mediation Board to mediate

this dispute under Section 5 First(a) of the Railway Labor Act, 45 U.S.C. § 155 First(a).

Without the assistance of the Mediation Board and without any bargaining leverage, rail labor will be unable to resolve this dispute, for no carrier will provide employee protections to its employees for altruistic reasons alone.[2]

Unfortunately, this case does not present an isolated instance, for our nation's rail carriers are relying upon the *CSXT* minor dispute ruling to oppose rail labor's efforts to enforce the Act's bargaining and status quo obligations in other line sale disputes. To date, three district judges have accepted that argument[3] and five other courts are considering that defense,[4] including two courts in which rail labor is attempting to enforce the Act's status quo obligation in connection with the National Section 6 notices. Indeed, in *Chicago & North Western Transportation Co. v. Railway Labor Executives' Assoc.*, *supra* note 3,[5] the district court followed

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[2] It should be noted that the settlement agreements that were reached with several of the committees involved, were reached *before* the Second Circuit had ruled, but after the adjustment board had rejected the carrier's contractual right argument.

[3] *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D. ILL. No. 87 C 9847, interlocutory order entered December 15, 1989; *Chicago & North Western Transportation Co. v. RLEA*, N.D. ILL. No. 88 C 444, decided October 6, 1989, *appeals pending*, 7th Cir. Nos. 89-3265 and 89-3436; and *General Committee, UTU v. CSX R.R.*, M.D. PA. No. CIV 87-1712, decided February 24, 1989, *appeal pending*, 3rd Cir. No. 89-5236.

[4] Those cases are: *General Committee, supra*, note 3, which is pending before the Third Circuit; *Chicago & North Western, supra* note 3, which is pending before the Seventh Circuit; *RLEA v. CSXT*, D.D.C. Civil Action No. 89-2639; *RLEA v. Chespeake Western Ry.*, E.D. Va. Civil Action No. 89-1157-A; *RLEA v. Burlington Northern R.R.*, W.D. Mo. No. 87-0696-CV-W-8.

[5] Rail labor has appealed the court's ruling; the railroad has cross-appealed from the district court's rejection of its definition of the issue to be arbitrated. *See*, App. J. at 4a.

CSXT, entered a permanent injunction enjoining rail labor from striking over the line sale, and concluded that because the case presented a minor dispute, the carrier "need not bargain with . . . [rail labor] over the line sale." *Id.* at 8.

Another problem with respondent CSXT's assertion that this case does not present matters of national importance, is that its view of this case as presenting two different disputes—a major dispute over rail labor's efforts to obtain new agreements, and a minor dispute over whether CSXT had the contractual right to abolish jobs during that bargaining process (CSXT Brief at 16)— is *not* the Second Circuit's view of this case. According to the Second Circuit, this case presented *solely* a minor dispute and its "confess[ed] to being somewhat puzzled by the district court's direction that CSX bargain with [the unions] . . . with respect to Section 6 notices served by them . . . ." App. at 22a. Indeed, respondent CSXT's acknowledgment that this case presents a major dispute shows that what rail labor has been arguing in vain throughout this and similar litigation, is true—what CSXT claims is a minor dispute is *actually* a dispute over the application of the Railway Labor Act's status quo obligation that was triggered by this major dispute. Such a dispute is one over statutory construction and not one within the adjustment board's jurisdiction to resolve contractual issues.

Whether such a dispute over the interpretation of the Act's status quo obligation should be allowed to transmute a major dispute into a minor one, is clearly an issue which is important to the orderly administration of the Railway Labor Act. Moreover, as we show below, there is currently a conflict among the Circuits on this classification problem.

II. THE SECOND CIRCUIT'S DECISION CLASSIFYING THIS DISPUTE AS BEING A MINOR DISPUTE IS IN DIRECT CONFLICT WITH A RECENT DECISION BY THE EIGHTH CIRCUIT

Rail labor has asked in its petition that, if this Court decides to grant this petition, but does not summarily reverse the Second Circuit's decision, this Court also consider the issue as to whether the appellate court properly classified this dispute as being a minor dispute. After this petition was filed, the Eighth Circuit issued a decision in *RLEA v. C&NW*, *supra*, following the remand of that case by this Court in Sup. Ct. No. 87-2049, *RLEA v. C&NW*, decided June 26, 1989 (109 S.Ct. 3207). In that decision, the Eighth Circuit, with one judge dissenting, rejected an identical classification argument and concluded that a similar dispute over line sales and Section 6 notices presented a major dispute. There is now a clear conflict among the circuits on this issue, involving identical Section 6 notices where the carriers have relied upon the same contractual provisions and comparable past practices to argue that the dispute over whether they can sell their rail lines without bargaining presents a minor dispute subject forever to the exclusive jurisdiction of the adjustment boards.

Although rail labor disagrees with those portions of the Eighth Circuit's decision which limit the scope of bargaining in a partial line sale case and which conclude that the status quo did not prohibit the carrier from selling during that bargaining (App. J. at 2a, 5a),[6] the court's rejection of the minor dispute classification, we submit, was clearly correct and was compelled by this Court's decisions in *Conrail* and in *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Assoc.*, 491 U.S.

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[6] Rail labor is currently preparing a petition to this Court to ask that this Court review those portions of the Eighth Circuit's decision.

—— (1989). As the Eighth Circuit explained (App. J. at 3a-4a):

> We reject the suggestion of the C&NW and of the dissent that the dispute between the parties is a minor dispute and thus subject to arbitration. The facts here are quite close to those in *P&LE*, and the Supreme Court there held that the dispute was a major one and that the railroad company was obligated to bargain with the union as to the effects of the sale. The union is not seeking an interpretation of the express or implied terms of the collective bargaining agreement nor is it seeking a ruling that a past practice should be enforced. Rather, it is seeking to negotiate over the effects of a sale on those C&NW employees who are affected by it. No clear reason has been advanced by the C&NW as to why we should categorize this dispute differently.

Petitioners respectfully submit that the Eighth Circuit's decision in *RLEA v. C&NW* shows that there is a square conflict among the Circuits on this classification issue, and thus, if this Court does not summarily reverse based on *Conrail*, it should grant the petition to consider *both* issues raised herein.

CONCLUSION

This Court should grant the writ and summarily reverse the Second Circuit, remanding for reconsideration in light of *Conrail*.

Respectfully submitted,

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December 29, 1989 *Attorneys for Petitioners*

APPENDIX

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5071

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY AND DAKOTA, MINNESOTA AND EASTERN RAILROAD,
Appellees.

STATE OF SOUTH DAKOTA,
Amicus Curiae/Appellee.

Appeal from the United States District Court
for the District of Minnesota

Filed: November 29, 1989

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

ORDER

On June 26, 1989, the Supreme Court granted a writ of certiorari in the above-entitled case. It then vacated

the judgment of this court and remanded the case to us for further consideration in the light of *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. ——, 109 S. Ct. 2584, 105 L.Ed.2d 415 (1989) (*P&LE*).

The court requested the parties to file letter briefs with respect to the application of *P&LE* to the instant case. After a careful review of the decision of the United States Supreme Court and the letter briefs, we revise our original opinion.

I.

There is one important difference between the facts in *P&LE* and those in this case. In P&LE, the carrier sold all of its assets to a newly formed subsidiary. Here, the Chicago and Northwestern (C&NW) sold only a portion of its assets (826 miles of rail line and 126 miles of trackage in South Dakota) to a newly formed railway company. Thus, we must decide whether the Supreme Court's decision that a railway company need not bargain with the unions with *respect to a sale of all of its assets* to another corporation applies to a case in which a railway company sells only a portion of its assets.

We believe that C&NW was not required to bargain over the sale in this case prior to the sale's completion. The sale was approved by the I.C.C., the sale was for an unprofitable, discreet section of the railway that might have been abandoned but for the sale, and after the sale C&NW would have no relationship with the purchaser. Thus, we hold that C&NW was not obligated to serve a section 156 notice on the union in connection with the proposed sale nor was it obligated to maintain the status quo and postpone the sale beyond the time the sale was approved by the Commission and was scheduled to be consummated.

This holding does not, however, end the matter. We also believe that *P&LE* made it clear that a railroad

selling all or a part of its assets is required to bargain about the *effects that the sale* will or might have on its employees:

> The disputed issue is whether P&LE was required to bargain about the effects that the sale would or might have upon its employees. *P&LE, in our view, was not entirely free to disregard the unions' demand that it bargain about such effects.*

P&LE, 105 L.Ed.2d at 435 (emphasis added). Moreover, C&NW can bargain about the effects of the sale even after the sale is consummated.

In *P&LE*, the Supreme Court held that the obligation to bargain over effects existed "only until the date for closing the sale arrived," which, of course, would not occur in this case until the ex parte 392 exemption became effective and the transfer occurred. We are convinced that the Supreme Court placed a time limitation on the obligation to bargain because after that date, the selling railroad would have no assets and no employees. Here, the selling railroad will retain the major portion of its assets and will continue to employ persons who are members of the labor organizations that are parties to this case. Thus, C&NW can bargain about the effects of the sale without delaying or upsetting the sale.

II.

We reject the suggestion of the C&NW and of the dissent that the dispute between the parties is a minor dispute and thus subject to arbitration. The facts here are quite close to those in *P&LE*, and the Supreme Court there held that the dispute was a major one and that the railroad company was obligated to bargain with the union as to the effects of the sale. The union is not seeking an interpretation of the express or implied terms of the collective bargaining agreement nor is it seeking a ruling that a past practice should be enforced. Rather,

it is seeking to negotiate over the effects of a sale on those C&NW employees who are affected by it. No clear reason has been advanced by the C&NW as to why we should categorize this dispute differently.

We have no quarrel with the test advanced by the dissent to determine whether a dispute is a major or a minor one. *Post* at 11. That test was approved by the United States Supreme Court in *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 109 S. Ct. 2477, 2482, 105 L.Ed.2d 250, 264 (1989), and this court in *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986). Here, C&NW claims that the dispute over what benefits, if any, the railroad employees should receive only relates to the execution of the agreement and should be arbitrated. We disagree. This fact can be illustrated by attempting to frame the issue that would be decided by an arbitration board established under the Railway Labor Act.

C&NW suggested before the district court for the Northern District of Illinois in a case they argue is controlling, that the issue in a case such as this should be whether C&NW violated its agreements with the unions. *Chicago & Northwestern Railway v. Railway Labor Executives Ass'n*, No. 88 C 444, slip op. (N.D. Ill. Oct. 6, 1989). We disagree. Both parties concede that their agreements neither permit nor prohibit the C&NW from selling a portion of its business.

Nor should or would the issue be as formulated by the district court in that case: "what treatment, in terms of pay (severance or otherwise), seniority rights, benefit rights, transfer rights, etc., the employees of the C&NW (who are affected by the line sale) are entitled to in terms of contractual provisions and attendant past practices." *Id.* at 6. The question thus phrased would give the arbitrator a roving commission to invent terms which were never agreed to by the parties.

III.

The Supreme Court in *P&LE* has determined that disputes of this nature are major ones. In light of *P&LE*, we conclude that the C&NW is obligated to bargain with the unions with respect to the *effects* of the sale only. Bargaining should commence promptly and proceed in accordance with the provisions of the Railway Labor Act.

Under our decision the sale will stand, and the right of the C&NW to exercise its right to sell all or a part of its holding will be preserved. Thus, the unions cannot prevent the sale. As in *P&LE*, however, the railroad company will be required to bargain over the effects of the sale on its employees, thus accomplishing the intent of Congress to balance the rights of employers and workers.

We vacate our opinion of May 31, 1988 and remand to the district court with directions that it enter an order requiring the C&NW to bargain on request of the Railway Labor Executives Association with respect to the effects of the sale on the employees of C&NW.

MAGILL, Circuit Judge, concurring in part and dissenting in part.

I concur in the order except for the majority's decision that the dispute over the effects of the sale is major.[1] I dissent from that decision because the district court has not made the factual findings that would enable us to determine whether this dispute is major or minor under the standard approved by the Supreme Court in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989) (*Conrail*). Under that standard, the dispute is minor if C&NW's claim that the effects of the sale are authorized by the parties' agreements and past practices is "arguably justified," i.e., is neither

[1] I agree that *if* this dispute is in fact major and not minor, then C&NW must engage in effects bargaining even though the sale has been consummated.

"frivolous" nor "obviously insubstantial." *Id.* at 2482, 2485, 2489. I would remand for an initial disposition of this issue by the district court based on factual findings regarding the parties' collective bargaining agreements and attendant past practices.[2] In prior proceedings, both this court and the district court resolved this case on the basis of the supposed superseding force of the Interstate Commerce Act, and accordingly did not reach the major-minor dispute issue presented under the Railway Labor Act (RLA).[3] *See Railway Labor Executives' Ass'n v.*

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[2] This issue has clearly been preserved. C&NW moved for summary judgment on the minor dispute ground in the district court, but the case was decided in its favor on an alternate basis. C&NW then raised its minor dispute claim on the unions' appeal to this court, and raises it again on remand from the Supreme Court.

[3] The unions are obliged to seek labor protection via the RLA procedures because congressional enactment and agency rulings have all but foreclosed the availability of such protection from the Interstate Commerce Commission in short-line sales to new carriers. A background explanation is provided in *FRVR Corporation —Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Company—Petition for Clarification,* Finance Docket No. 31205, slip op. at 1-4 (January 28, 1988) (citations and footnotes omitted):

> Since partial deregulation under the Staggers Rail Act of 1980 nearly 200 short-line and regional railroads have come into existence—partially reversing the industry's long trend of exit and contraction. These new roads now operate approximately 13 thousand miles of rail lines with 4 thousand workers handling more than 1.3 million carloads yearly.
>
> Up until the Staggers Act, the principal means of exit for large "Class I" railroads from unprofitable markets had been through abandonment. Substantial deregulation of motor freight under the 1980 Motor Carrier Act threatened to accelerate this trend through new and increasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local car-

Chicago & Northwestern Transp. Co., 848 F.2d 102 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 3207 (1989) (mem.).

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riers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor—both on the smaller lines and throughout a reinvigorated Class I system—and they foster optimal recognition of the energy efficiencies and environmental benefits of rail service.

The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a branch line sale process in which labor protection was foreclosed by the statute. In the past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and potentially quite expensive) labor protection. By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individuals applications on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay. The Commission issued rules exempting certain classes of line sales from drawn out Commission regulation, retaining for itself the unqualified right to review and correct any unique problems that might arise out of exceptional circumstances. [*Ex Parte No. 392* (Sub No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under*

The majority completely ignores the absence of the requisite factual findings and, as a consequence of their absence, only purports to apply the *Conrail* standard without actually doing so. By reaching its decision on the major-minor dispute issue in this manner, the majority in essence creates a per se rule whereby disputes over the effects of short-line sales are major as a matter of law, irrespective of a claim that the effects are sanctioned by agreements and past practices. Clearly, nothin *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989) (*P&LE*), even be-

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49 U.S.C. 10901, 1 I.C.C.2d 810 (1986), *review denied sub nom. Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).]

The Commission's policy has been validated by practical results. New railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved. Most observers supported and welcomed the Commission's policy initiative, but it has been consistently opposed by organized rail labor. Under the rules adopted in 1986, opposition to individual transactions is presented in petitions to revoke the grant of exemption. Such petitions have been filed in approximately 20 of the 120 transactions processed under the 1986 rules. Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown. The Commission's authority includes the power to impose labor protective conditions through partial revocation, although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent, or where existing contracts specified that line sales were subject to procedural or substantive protection. Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.

gins to suggest such a rule exempting these disputes from the analysis required by *Conrail*.

The majority's decision that the unions' request for effects bargaining presents a major dispute is premised on the view that "[t]he facts here are quite close to those in *P&LE*." *Ante* at 3. However, *P&LE* must be distinguished insofar as the railroad there did not assert that the effects of the sale were authorized by existing agreements and past practices.[4] Without such a claim, the *Conrail* standard is obviously inapplicable. Indeed, if the railroad does not make a contractual justification claim in response to a union request for effects bargaining, there can be little doubt that the dispute in question is major. *See Conrail*, 109 S. Ct. at 2481 (line between major and minor disputes "looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take

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[4] The district court in *P&LE* stated that "[t]here appears to be little argument that the dispute at hand [over effects of the sale] constitutes a 'major' dispute." *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 677 F. Supp. 830, 835 (W.D. Pa. 1987), *aff'd*, 845 F.2d 420 (3d Cir. 1988), *rev'd*, 109 S. Ct. 2584 (1989). As the Seventh Circuit has observed, "there is no indication in the analysis by the Third Circuit in *P&LE* that it considered the effect of a claim by a rail carrier employer that its actions pertaining to the employees whose jobs were to be abolished by the proposed sale were sanctiond by and proper under the collective bargaining agreements between the carrier and the unions representing its employees." *Chicago & North Western Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1286 n.3 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988). The Supreme Court likewise did not mention a contractual justification claim and its perfunctory analysis appeared to take it as uncontested that the dispute over effects was major. *See P&LE*, 109 S. Ct. at 2597. Certainly, nothing in the Court's opinion suggests or implies that all short-line sales automatically require effects bargaining regardless of a claim that the effects of the sale are authorized by agreements and past practices. There is simply no basis for the majority's categorical assertion that "[t]he Supreme Court in *P&LE* has determined that disputes of this nature are major ones." *Ante* at 5.

the disputed action"). In contrast to *P&LE*, in this case C&NW claims that job abolishments and other effects of the short-line sale are authorized by its existing agreements with the unions and attendant past practices. Specifically, C&NW contends tht the force-reduction provisions of the collective bargaining agreements give it the right to abolish jobs for any reason whatever upon providing the notice prescribed by the agreements. C&NW emphasizes its further contention that this interpretation of the agreements is confirmed by past practices regarding job abolishments in its over 5000 miles of abandonments since 1968. It is well established that longstanding past practices not only shed light on the meaning of express terms of collective bargaining agreements, but can themselves ripen into implied terms of the agreements. *See, e.g., Conrail*, 109 S. Ct. 2485 (noting that "collective-bargaining agreements may include implied as well as express terms" and that "the parties' 'practice, usage and custom' is of significance in interpreting their agreement"). Because of C&NW's contractual justification claim, and in particular its heavy reliance on past practices, it is necessary to remand for factual findings to which the *Conrail* standard can be applied. Contrary to the import of the majority's holding, *P&LE* cannot be read to render the dispute here major as a matter of law.

The majority's position violates the fundamental principle that "factfinding is the basic responsibility of district courts, rather than appellate courts." *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974) (per curiam). It is elementary that when the district court has failed to make essential factual findings, the appropriate course is "a remand for further proceedings to permit the trial court to make the missing findings." *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982). More specifically, remand in this case is called for by our previous cases addressing the proper course for de-

ciding whether a dispute is major or minor. That decision "turns upon the facts in each case" and "involves first a determination of factual issues, and then conclutions of law based on those findings." *Missouri Pacific Joint Protective Bd. v. Missouri Pac. R.R.*, 730 F.2d 533, 537 (8th Cir. 1984) (citation omitted). The crucial factual issues are the content of the parties' collective bargaining agreements and the nature and extent of past practices. *See Alton & Southern Lodge No. 306 v. Alton & Southern Ry.*, 849 F.2d 1111, 1114 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 3214 (1989). The district court's findings as to these factual issues may be reversed only if clearly erroneous. *Id.* Whether a dispute is major or minor based on those findings is a question of law which we review *de novo*. *International Ass'n of Machinists v. Soo Line R.R.*, 850 F.2d 368, 374 (8th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1118 (1989). By dispensing with the underlying factual findings necessary for an informed and justifiable resolution of the major-minor dispute question, the majority departs from our established practice and strips the district court of its fact-finding role.

We should instead follow the path taken in *Missouri Pacific*, 730 F.2d 533, where we were presented with a situation virtually identical to that before us now. In that case, "the basic issue" was "whether the dispute is minor or major." *Id.* at 536. As here, the district court received some evidence on the issue but "did not inquire into whether the dispute involved is major or minor and made no factual findings in this regard." *Id.* We realized that "[i]n this posture the only way we could reverse and order [the relief sought by the appellant union] would be to decide as a matter of law that the dispute involved is a major one." *Id.* However, we could not reach such a decision because the railroad claimed that established past practices justified its actions, and we recognized that "[i]n determining whether the dis-

pute is major or minor the factual issues of [the railroad's] past practices and its operational changes are closely intertwined with the legal conclusions regarding the scope of the agreements between the parties." *Id.* at 537. Accordingly, we remanded the case, acknowledging that "the determination of whether the dispute is major or minor is, in the first instance, an issue for the district court to decide." *Id.* The majority provides no reason why remand is not equally necessary in the instant case. In particular, it does not explain how it can purport to apply the *Conrail* standard when the district court has made no factual findings on the major-minor dispute issue.

In *Conrail*, decided two days before *P&LE*, the Supreme Court held that "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute in major." 109 S. Ct. at 2482. This court applied the same standard prior to its approval by the Supreme Court. In *Soo Line*, we stated that "[i]f the parties disagree whether the dispute can be resolved by reference to an agreement, the dispute is minor unless the claims of contractual justification are 'frivolous' or 'obviously insubstantial.'" 850 F.2d at 376 (quoting First and Seventh Circuit decisions). Contractual justification imposes only a "light burden" on the railroad. *Conrail*, 109 S. Ct. at 2489. Accordingly, when in doubt, courts will construe disputes as minor.[5] *Soo Line*, 850 F.2d at 377.

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[5] The railroad's light burden of persuasion is necessary to protect the National Railroad Adjustment Board's exclusive jurisdiction over minor disputes. *Soo Line*, 850 F.2d at 377. Minor disputes are resolved by compulsory and binding arbitration before the Board, or before other adjustment boards upon which the railroad and the unions agree. 45 U.S.C. § 153 (1982). In *Conrail*,

I am unwilling to assume, as the majority effectively does, that factual findings by the district court would inevitably reveal that C&NW is unable to meet the light burden of establishing its contractual justification claim is neither frivolous nor obviously insubstantial. Recent decisions by the Second and Seventh Circuits have held that disputes over the effects of short-line partial sales were minor because in each case the railroad's contractual justification claim satisfied this standard. *CSX Transp., Inc. v. United Transp. Union*, 879 F.2d 990,

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the Supreme Court emphasized that making full use of the Board (or other adjustment boards) is important because it "help[s] to 'maintain agreements,' by assuring that collective-bargaining contracts are enforced by arbitrators who are experts in 'the common law of [the] particular industry' "; it also "will assure that the risks of selfhelp are not needlessly undertaken, and will aid '[t]he peaceable settlement of labor controversies.' " 109 S. Ct. at 2484 (quoting Supreme Court decisions).

If a dispute is major, the RLA requires the parties to undergo a "virtually endless" process of bargaining and mediation. *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 444 (1987). Failure of the process "frees the parties to employ a broad range of economic selfhelp." *Conrail*, 109 S. Ct. at 2484. The Supreme Court described the major dispute procedures in *P&LE*:

> The parties must confer, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its service *sua sponte* if it finds a labor emergency to exist. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. If arbitration is rejected and the dispute threatens "substantially to interrupt intersetate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*.

109 S. Ct. at 2589 n.4 (citations omitted) (quoting *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 378 (1969)).

998-99 (2d Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3291 (U.S. Oct. 6, 1989) (No. 89-565); *Chicago & North Western Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1283-86 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988).[6] The district court in *C&NW* reaffirmed the holding in that case after reexamining it in light of *P&LE* and *Conrail*, noting that *Conrail* adopted the same standard used by the Seventh Circuit and specifically rejecting the unions' argument that *P&LE* required an opposite result. No. 88 C 444, slip op. (N.D. Ill. Oct. 6, 1989). The relevance of the *C&NW* case is increased by C&NW's assertion that it involved not only the same parties, but also the same agreements, past practices and contractual justification claim as the instant case. After a careful evaluation, the Seventh Circuit held that the dispute in *C&NW* was minor because:

> There can be no doubt that the agreements and past practice arising thereunder embrace matters of job abolishment, layoff and reassignment resulting from a layoff with regard to the individuals affected by the Duck Creek South line sale who are able to retain their employment with C & NW. In addition, C & NW's claim that the agreements and attendant past practices extend to the related matters of its obligation to employees who are laid off after their positions are abolished appears to have a least some factual support.

855 F.2d at 1284. In *CSX*, 879 F.2d at 1001, the Second Circuit observed that *C&NW* "addressed a fact situation almost identical to that presented here." The decisions in *CSX* and especially *C&NW* make it clear that, at a mini-

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[6] It is worth noting that the circuit courts in *CSX* and *C&NW* did not address the major-minor dispute issue in the first instance as the majority does here. Rather, in each case the circuit court affirmed a district court determination that the dispute was minor. *CSX*, 879 F.2d at 1002; *C&NW*, 855 F.2d at 1286.

mum, C&NW's claim warrants serious consideration and should not be disposed of in the summary fashion chosen by the majority in complete disregard of the lack of necessary factual findings.

After concluding "*P&LE* made it clear that a railroad selling all or a part of its assets is required to bargain" over effects of the sale, *ante* at 2, the majority attempts to bolster its position by finding that the unions' section 6 notices [7] proposing new agreements to provide employee protection themselves render the dispute major. *Ante* at 3. The majority fails to recognize that if C&NW's contractual justification claim satisfies the *Conrail* standard, then the unions' section 6 notices proposing new agreements to cover employees affected by the sale could not transform the situation into a major dispute. *CSX*, 879 F.2d at 1000-01; *see also Airline Pilots Ass'n v. Eastern Air Lines*, 863 F.2d 891, 900 (D.C. Cir. 1988) (rejecting unions' "suggestion that the mere serving of § 6 bargaining notices changes the nature of the dispute"); *Missouri Pacific*, 730 F.2d at 536 n.3 ("The serving of a section 6 notice is not determinative of whether the controversy involved is major or minor."). The unions in both *CSX*, 879 F.2d at 998, 1000, and *C&NW*, 855 F.2d at 1280, 1284, also served notices seeking new agreements to govern the effects of the short-line sales, but that did not change the minor disputes into major ones. As the Second Circuit observed in *CSX*, 879 F.2d at 1001, if existing agreements governed the abolishment of jobs in connection with the line sale, "rights which [the unions] might seek to obtain by bargaining for future agreements would manifestly be irrelevant to that controversy." *See also Air Line Pilots*, 863 F.2d at 900 ("a rule that allows a party to characterize all disputes as 'major' through a unilateral action such as serving § 6 notices on the other party is unwise and contrary to the two-track procedure of the RLA").

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[7] Section 6 of the RLA, 45 U.S.C. § 156 (1982).

The majority ultimately concedes that the *Conrail* standard is controlling, *ante* at 4, but then avoids actually applying it, which is not surprising since this concession cannot be reconciled with the majority's later reiteration of its view that "*P&LE* has determined that disputes of this nature are major ones." *Ante* at 5. The majority cannot have it both ways. Either *P&LE* makes the dispute over effects major as a matter of law or the *Conrail* standard must be applied to determine whether the dispute is major or minor. That the majority is unwilling to take the latter position, and unable to do so without remanding for factual findings, is evidenced by its utterly inadequate "analysis" of C&NW's contractual justification claim. It merely states that it disagrees with the claim without providing any explanation whatsoever as to how (or even whether) it determined that C&NW cannot meet the light burden of establishing the claim is neither frivolous nor obviously insubstantial. This silence speaks volumes for it confirms that no such explanation can be provided because the district court has not made the requisite factual findings. Furthermore, by declaring that it disagrees with C&NW's claim, the majority oversteps the bounds of the courts' limited role under the RLA and usurps the function of the National Railroad Adjustment Board (NRAB). *Conrail* emphatically reaffirmed the well-established rule that "under the RLA, it is not the role of the courts to decide the merits of the parties' dispute." 109 S. Ct. at 2488. Rather, the courts' role is confined to determining whether a contractual claim is "arguably justified." *Id.* at 2488-89.

In an effort to justify its failure to apply the correct legal standard, the majority attempts to show that the dispute is major by illustrating how a proper issue for arbitration could not be framed. *Ante* at 4. Neither of the two points the majority makes using this curious approach supports its position. First, the undisputed fact that the parties' agreements neither permitted nor prohibited the sale itself is certainly relevant in determin-

ing whether C&NW was obligated to bargain over its *decision to sell*, *see P&LE*, 109 S. Ct. at 2592-93, 2596, but it says nothing about whether C&NW's contractual justification claim regarding the *effects of the sale* is either frivolous or obviously insubstantial. Indeed, the parties in *CSX* and *C&NW* likewise never contended there were any agreements permitting or prohibiting the short-line sales. Second, the issue for arbitration defined by the district court in *C&NW*, quoted *ante* at 4, which the majority says would be improper in this case, simply called for the NRAB to interpret existing express and implied agreements and then apply them to employees affected by the short-line sale.[8] Such an arbitration issue would be proper in the instant case if the dispute over effects is minor, as it was in *C&NW*. It obviously would be improper if the dispute is major, in which case the dispute would not even be subject to arbitration. The majority rejects the arbitration issue in *C&NW* as improper without first having actually applied the *Conrail* standard to determine whether the dispute is major (or explaining why the Seventh Circuit's decision in *C&NW* was incorrect). The majority thus rejects the possibility of framing a proper issue for arbitration in this case by positing the existence of a major dispute. Such circular reasoning is hardly persuasive. More importantly, one is left wondering how the majority can profess to know that a particular arbitration issue "would give the arbitrator a roving commission to invent terms which were never agreed to by the parties," *ante* at 4, when the district court has made no factual findings regarding the parties' express and implied agreements.

Even assuming the dispute over effects is major, the majority errs by exceeding the contours of *P&LE*'s direction that certain union demands are excluded from

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[8] The district court in *C&NW* noted that "[t]his issue for arbitration is essentially the issue [previously] presented by C&NW to the NRAB" after the Seventh Circuit had held the dispute was minor. No. 88 C 444, slip op. at 6 (N.D. Ill. Oct. 6, 1989).

effects bargaining. *P&LE* makes it clear that C&NW is not obligated to bargain about union demands that can only be satisfied by the purchasing railroad, the Dakota, Minnesota & Eastern Railroad (DM&E),[9] because such demands seek to change or dictate the terms of the sale, and thus in effect challenge the decision to sell itself. 109 S. Ct. at 2597. Although the majority correctly holds that C&NW was not required to bargain over the decision to sell, it fails to exclude from effects bargaining those matters which can only be implemented by the buyer. The unions contend that such matters are bargainable here, Appellant's Letter Brief at 13, and include in their demands for labor protection a proposal that DM&E assume the applicable C&NW agreements. *Id.* at 18 n.9; Appellant's Brief at 9. Demands such as this are excluded from effects bargaining under *P&LE*.

I express no opinion as to whether the dispute over effects is major or minor.[10] I simply contend that this issue involves as yet undetermined facts essential to application of the controlling *Conrail* standard, and that we should therefore follow the course taken in *Missouri Pacific* by remanding for an initial disposition of the issue by the district court based on factual findings regarding the content of the parties' agreements and the nature and extent of attendant past practices. For these purposes, an additional record may be necessary.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[9] The short-line sale to DM&E was consummated on September 4, 1986. DM&E has owned and operated the line since that time.

[10] Contrary to the majority's characterization of my position, *see ante* at 3, I am not suggesting that the dispute over effects is minor. The majority seems to assume that we must resolve this issue one way or the other even though the present posture of this case does not allow us to do so.